FILE COPY

FILED
AUG 10 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

NO. 210

MRS. WOODROW VIRGINIA STONE, *Petitioner*

vs.

STRICKLAND TRANSPORTATION COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

DORSEY HARDEMAN
McBurnett Building
San Angelo, Texas

JOHN J. WATTS
P. O. Box 1031
Odessa, Texas
Attorneys for Petitioner
Woodrow V. Stone

DORSEY HARDEMAN
Of Counsel

E. Dunean & Co., Brief Printers, Dallas

IN THE

Supreme Court of the United States

NO. .....

MRS. WOODROW VIRGINIA STONE, *Petitioner*

vs.

STRICKLAND TRANSPORTATION COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your Petitioner, Mrs. Woodrow Virginia Stone, respectfully prays for the issuance of a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, to review the judgment of the Court entered on April 13, 1948, with no opinion save the notation that the judgment

of the trial court was affirmed and the citation of two authorities, motion of petitioner for a rehearing was denied on May 12, 1948, and no opinion was rendered in connection therewith, in a case numbered and entitled on the docket of said Court as "No. 12,219, Woodrow V. Stone vs. Strickland Transportation Company, Appellee," the judgment being one simply affirming an instructed verdict entered by the trial court.

The certified transcript of the record in this case, including the proceedings in the said Circuit Court of Appeals is presented herewith in accordance with Rule 38 of this Court.

I.

SUMMARY STATEMENT OF MATTER INVOLVED

This case involves only one question, to-wit, whether or not one Roy White was acting within the scope of his employment for the respondent, Strickland Transportation Company, in the operation of a motor vehicle for said company at the time that the Strickland Transportation Company's vehicle struck the car in which petitioner was riding, resulting in serious and permanent injuries to petitioner.

The two points involved in this appeal as set forth in the Motion For Rehearing filed before the Circuit Court are as follows:

(1) The Honorable Circuit Court of Appeals erred in holding impliedly (without a written opinion) by citing the DeFrates case that the appellee's truck driver had deviated from the scope of his employment on the occasion in question.

(2) The Honorable Circuit Court of Appeals erred in holding, and again we have to assume what was in the mind of the Court, since no written opinion was rendered and only two cases cited, but we presume that the Honorable Circuit Court intended to hold that under the Huerta case, cited in the opinion affirming the judgment, "that the appellee's truck driver, Roy White, had not resumed or returned to the zone of his employment at the time of the collision in question."

II

JURISDICTION

(1) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, (28 U. S. C., Sec. 347).

(2) The judgment of the Court of Appeals was rendered in a civil action.

(3) The date of the judgment to be reviewed is April 13, 1948.

Petition for rehearing filed by respondents was denied May 12, 1948,

(4) It is believed that the following cases sustain the jurisdiction of this Court:

West v. American T. & T. Co., 311 U. S. 223, 85 L. Ed. 139;

Story Parchment Co. v. Patterson Parchment Paper Co., et al, 282 U. S. 555, 75 L. Ed. 544;

Galloway v. United States, 319 U. S. 372, 87 L. Ed. 1458;

Cities Service Oil Co. v. B. P. Dunlap, et al, 308 U. S. 208, 84 L. Ed. 196;

Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481.

(5) The decision of the Court below conflicts with the decisions of other Circuit Courts of Appeals on similar matters and said Circuit Court has decided important questions of local law in a manner in conflict with the decisions of the Texas Courts, and said Circuit Court has decided important questions of general law in a manner that is conflicting with weight of authority; and the opinion of the Circuit Court constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Wherefore under Rule 38 (5) (b) of the Revised Rules of the Supreme Court of the United

States, this discussion may be reviewed by this Honorable Court.

In *Galloway v. United States*, above cited, 319 U. S. 372, 87 L. Ed. 1458, this Court quotes a Writ of Certiorari in a case involving a question as to whether the evidence was sufficient to show when the plaintiff's total and permanent disability began. The majority of the Court held that the evidence was insufficient, Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy dissenting.

In a very enlightening opinion, Mr. Justice Black demonstrates that *the Supreme Court should grant Writs of Certiorari in cases where the right of trial by jury has been denied, this right having been one* guaranteed under the Seventh Amendment to *the Constitution.* We cannot refrain from quoting from this most learned opinion *since it demonstrates the duty of this Honorable Court to grant this Writ of Certiorari.* In that case, Justice Black said in part as follows:

> "The Seventh Amendment to the Constitution guarantees a jury trial in law cases, where there is substantial evidence to support the claim of the plaintiff in an action. If a single witness testifies to a fact sustaining the issue between the parties, or if reasoning minds might reach different conclusions from the testimony of a single witness, one of which would substantially support the issue of the contending party, the issue must be left to the jury. Trial by jury is a fundamental guaranty of the rights of

the people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials.

The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the judge or the jury must decide facts and to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights, may be peculiarly difficult, for here it is our own power which we must restrain. We should not fail to meet the expectation of James Madison, who, in advocating the adoption of the Bill of Rights, said: "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights: . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of right." So few of these cases come to this Court of the District Courts and the Circuit Courts of Appeal are the primary custodians of the Amendment. As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. I shall continue to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances."

III.

PRINCIPAL QUESTIONS INVOLVED

(a) The opinion of the Circuit Court affirming the judgment of the District Court in which an instructed verdict was granted and a jury trial was denied is clearly erroneous since the evidence in the case at bar clearly raised an issue for the jury as to whether Roy White was acting within the course of his employment for the defendant, Strickland Transportation Company.

> "The evidence in the case at bar clearly raised an issue for the jury as to whether Roy White was acting within the course of his employment for the defendant, Strickland Transportation Company, in the evidence of the said Roy White showing that he had instructions not to deliver freight unless the freight was receipted for; that at the time of the accident he was unable to deliver the freight due to the fact that there was no one at the Hill Truck Lines to receive said freight during the noon hour; that with the load of freight still upon his truck he went home for lunch and was returning to the Hill Truck Lines for the purpose of delivering the freight when the accident in question occurred; that under such circumstances, a jury issue was raised as to whether the said Roy White was acting within the scope of his employment for the defendant, Strickland Transportation Company."

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

In this case, we have the additional ground that the only judicial opinion rendered was one saying that the judgment of the trial court is affirmed, citing two cases. We respectfully submit to this Honorable Court that it is not only contemplated that the petitioner was entitled to a trial by jury as to fact issues but that it was further contemplated that the Honorable Fifth Circuit owed the bar, the petitioner and petitioner's counsel the right to render an opinion stating the grounds upon which said judgment was affirmed.

We think that the opinion heretofore quoted from in the Galloway case clearly demonstrates the necessity of submitting this matter to a jury since the evidence raised a fact issue for the jury and the right for trial by jury as guaranteed by the Constitution has been denied.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of the Supreme Court of the United States directed to the United States Circuit Court of Appeals for the Fifth Circuit, demanding that Court to certify and send to this Court a full and complete transcript of the Record and of the proceedings of the said United States Circuit Court of Appeals for the

Fifth Circuit had in this cause numbered and entitled on the docket "No. 12,219, Woodrow V. Stone, Apellant, vs. Strickland Transportation Company, Appellee," that this cause may be reviewed and determined by this Court, as provided for by the Statutes of the United States and that the judgment of the said United States Circuit Court of Appeals be reversed by this Court and for such further relief as to this Court may seem proper.

Respectfully submitted,

.....

DORSEY HARDEMAN
McBurnett Building
San Angelo, Texas

.....

JOHN J. WATTS
P. O. Box 1031
Odessa, Texas
Attorneys for Petitioner,
Woodrow V. Stone

.....

DORSEY HARDEMAN
Of Counsel

A copy of this petition for writ of certiorari and brief in support thereof has been furnished Mr. John R. Fullingim, Oliver-Eakle Building, Amarillo, Texas, attorney for Respondent.

.....

JOHN J. WATTS

IN THE

Supreme Court of the United States

NO. .....

MRS. WOODROW VIRGINIA STONE, *Petitioner*

VS.

STRICKLAND TRANSPORTATION COMPANY, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

JURISDICTION

The grounds of jurisdiction stated in the petition, which is printed in this brief, will suffice and for the sake of brevity will not be here reprinted.

II.

STATEMENT OF THE CASE

The facts pertinent of the question presented are stated in the petition and in the interest of brevity are not repeated here.

III.

SPECIFICATION OF ERROR

The error which the Petitioner will urge if the writ of certiorari is issued is as follows:

The Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court for the Western District of Texas, erred in not reversing and remanding the judgment for a new trial since the evidence raised issues of fact for the jury to determine whether Roy White, respondent's agent, was acting within the course of his employment at the time of the collision in question.

IV.

STATEMENT

The above two points will be grouped together and discussed without recopying same. The evidence involved raised the issue for the jury, or perhaps raised the proposition as a matter of law, that the said Roy White was acting within the scope of his employment at the time of the collision in question is as follows:

"Mr. Fullingim:

Q. What time did you leave Strickland Transportation Company to go to Hill Lines?

A. It was between 11:00 and 11:30. I imagine it was closer to 11:30.

Q. What time did you arrive?

A. I made Navajo before I went on to Hill & Hill.

Q. Where is Navajo?

A. It is right here on the 1100 Block.

Q. 1100 Block on Grant Street, is that correct?

A. Yes, sir.

Q. Did you unload the freight that you had for Navajo?

A. Yes, sir.

Q. When you left the Navajo, where did you go?

A. Hill & Hill.

Q. How far is it from Hill Lines—from Navajo to Hill Lines, Inc.?

A. About two blocks.

Q. What time did you say you arrived at Hill Lines?

A. A few minutes after 12:00 because the boys had took off for dinner.

Q. Then after you left—What did you do when you got to Hill Lines?

A. I got out to see if someone would check the freight to unload it but there was no one there.

Q. What did you do then?

A. Well, I left and went on out to the house.

Q. Come here on this map and follow for me from the exact time you left Hill Lines until you arrived.

A. I backed out here on 13th and Buchanan.

Q. Which direction did you go from Hill Lines to Buchanan?

A. North from Buchanan.

Q. To Buchanan?

A. East to Buchanan.

Q. Which direction did you go from Hill Lines to Buchanan?

A. I believe it was west.

Q How many Blocks?

A. Four Blocks.

Q. Then which direction did you go?

A. North.

Q. On what street?

A. Buchanan.

Q. How far north did you go?

A. I picked up my sister up on 7th and Buchanan.

Q. You went what direction on Buchanan now?

A. I was gong north.

Q. Where did you see your sister?

A. On 7th and Buchanan.

Q. Where had you started?

A. I had started out to the house to eat.

Q. What house?

A. My sister's.

Q. Where does your mother live?

A. North Grant.

Q. Did you go to your mother's?

A. No, sir.

Q. Why?

A. My sister said no one was out there.

Q. Where did you see your sister?

A. 7th and Buchanan.

Q. Did she get in the truck with you?

A. Yes, sir.

Q. On the corner of 7th and Buchanan Street?

A. Yes, sir.

Q. Then which way?

A. I went north to Third and Buchanan.

Q. Proceeded on Buchanan north to Third Street? Then which way did you go after you got to Third Street?

A. East.

Q. How far on Third Street did you go East?

A. To Grand Avenue.

Q. And after you got to Grand Avenue which way did you go?

A. I went south to 6th and Grand.

Q. Then which way did you go?

A. East to Dallas.

Q. Is that where your sister lived?

A. Yes, sir.

Q. What did you do when you got there to your sister's?

A. I ate and came on to 10th Street and came on in.

Q. After you left your sister's place which way did you go?

A. South to 10th.

Q. When you got to 10th which way did you go?

A. I turned west.

Q. Where did you go then?

A. I was coming in on 10th to go to Hill & Hill Motor Freight and that is where the accident occurred.

Q. How many Blocks west is the Hill & Hill Freight Line from your sister's house?

A. 34 I believe—no, Grant takes off some. About 28 Blocks I imagine.

Q. Now after you picked your sister up on the corner of 7th and Buchanan Street and proceeded south to Third Street, you say you then turned west on Third Street and went to your sister's home?

A. I turned east.

Q. Turned east and went to your sister's home and in doing that you drove right by the Strickland Transportation place of business?

A. Yes, sir.

Q. You drove right on by. How many blocks east of the Strickland Transportation Company's place of business is it to where your sister lives?

A. About 21 or 22 blocks.

Q. And at the time you drove by the Strickland Transportation Company place of business with your sister in the car and proceeded on east, you knew you were doing it in violation of strict company rules and regulations?

A. Yes, sir.

Q. What is the regular route you would normally go from Strickland Transportation Company here to Hill Lines, Roy? Show me here on the map, will you?

A. We would come out on Third.

Q. Which way would you go on Third?

A. West.

Q. To what street?

A. Grant.

Q. Which way would you turn on Grant Street?

A. South to Navajo.

Q. Isn't it true that you were instructed, and you knew at the time you went to Hill Lines and couldn't find anyone to unload this freight, that you should

have taken the truck back to Strickland Transportation Company and left it?

A. Yes, sir.

Q. That is your instructions?

A. Yes, sir.

Q. And it was true that you had instructions that you would not unload unless someone was there to give you a receipt for it?

A. Yes, sir.

Q. But it was true that if there wasn't anyone there that you were to return the truck to the Strickland Transportation Company until such time as someone was there?

A. Yes, sir.

Q. And had you gone back to the Strickland Transportation Company from Hill Lines at the time which way would you naturally have gone back?

A. I would have gone over to the Santa Fe Lunch across the tracks.

Q. Now you are at Hill Lines and if you had gone back to leave the Strickland truck to wait for someone to come back so you could deliver the freight you would have gone—

A. Gone to Third and Grant and east to Strickland Motor Company.

Q. You speak of that sometime you went to lunch with Mr. Welsh in his car, was that just a matter of accommodation?

A. Yes, sir.

Q. He had nothing to do with company business?

A. No, sir, he would just take us up there.

Q. Was it more or less on the way which he went on to his lunch?

A. Yes, sir.

Q. Where had you started at the time this accident occurred when Mrs. Woodrow V. Stone was injured on the 4th day of June about the hour of 1:00 P. M., on State Highway 287 located in the City of Amarillo at 10th Avenue. Where had you started?

A. I started to deliver some freight.

Q. Where were you going to deliver that freight?

A. Hill & Hill Motor Freight.

Q. Who instructed you to do that?

A. Mr. Welsh.

Q. When did you generally go to lunch?

A. We usually work and some of the boys take off. It is uncertain.

Q. What would you do with the company truck when loads of freight were to be delivered during the lunch hour?

A. That was the first time I was ever called out.

Q. What did the rest of the boys do in connection with that?

A. There wasn't but three of us. They ate around there and Mr. Welsh had a car and some of the boys ate with him."

The witness, Mrs. O. W. Webb, mother of Roy White, defendant's truck driver, testified as follows:

"Q. Where do you live?

A. 707 N. Grant.

Q. You are the mother of Roy White, the driver of the truck involved in this acccident?

A. Yes, sir.

Q. Whenever your son would have lunch at your house during the time he worked for Strickland Transportation Company, how would he come home?

A. In a truck.

Q. Strickland Transportation Company truck?

A. Yes, sir.

Q. He would eat lunch—

A. (Interrupting.) Whenever he did come home for lunch he did come home in the truck.

Q. You are also the mother of Thelma Busby?

A. Yes, sir.

Q. She was out in California sometime ago, wasn't she?

A. Yes, sir.

Q. A sister of White?

A. Yes, sir.

Q. About how long was it she was living in California?

A. I cannot tell you, I do not remember, two or three years you know.

Q. She got back last March?

A. Yes, sir.

Q. Do you remember whether your son ate lunch with you the day this accident occurred or not?

A. I don't know.

Q. You do not remember?

A. I do not remember.

Q. Did you and Thelma ever ride in the company truck?

A. No, sir."

Mr. J. T. Welsh testified as follows:

"Q. You carried him quite often to lunch?

A. I would two or three times a week.

Q. You carried him so as to make it easier for him to get back to work sooner, is that right?

A. Yes.

Q. 10th Street, that is a paved Street?

A. Yes.

Q. And that Street, of course Mr. White would deliver freight all over town, wouldn't he?

A. He did in the course of his job, yes." (R. Pg. 18).

Q. Did you ever give any instructions except the instructions that they were not to use the truck except on company business, that is the only instructions that were ever given?

A. What do you mean?

Q. I say the only instructions that you ever gave were those you have just testified about, that is, that company trucks were not to be used except on company business on these placards?

A. Yes, and also they could not drive the trucks home and could not take them home at night. (R. Pg. 20).

Q. You did not undertake to tell him how to go to the Hill Lines on this particular morning?

A. Not this particular morning.

Q. You knew at the time this accident happened he was on his way to deliver freight to Hill?

A. He was coming back from where he had left.

Q. Going to Hill, was his freight still on the truck that he started out to deliver to Hill at the time the accident occurred?

A. Yes. (R. Pgs. 21 and 22).

Q. State whether or not at the time you employed Mr. White you gave him any instructions with reference to whether or not he could or could not use those company trucks down there for any type and mode of transportation other than on company business.

A. They were emphatically given instructions that they were not to use them for any personal use, for business only for the company." (R. Pg. 9)

The deposition of the witness truck driver, Roy White, first read as follows:

"Q. In fact, they had placards on the door and around the place of business to the effect that no one was to use company property except on company business. Is that true?

A. I believe that is sc.

Q. Mr. Welsh told you that on no occasion were you to drive a company truck to lunch other than on company business.

A. That is right." (R. Pg. 26) After the deposition had been prepared, the word "or" was inserted in the deposition.

At the conclusion of the Witness, Welsh's, testimony, the following question and answer was given which shows conclusively that White was never directly instructed not to take the company truck home for lunch:

"Q. You have been on the stand about thirty minutes?

A. I don't know.

Q. And you have testified as to all instructions that were given them and you never mentioned that particular instruction except on this last statement when he asked you if they made that direct instruc-

tion, isn't that right; in other words you have constantly stated in the presence of the jury when you were asked what instructions were given, that the only instructions were not to use the truck except on company business.

A. Not to take it home for lunch, that would be off of company business." (R. Pg. 23)

AUTHORITIES

Chisos Mining Company v. Huerta, et al., (Sup Cit.), 171 S. W. (2d) 867;

Collin County Motor Co. v. Howard, 121 S. W. (2d) 460;

Gulf Refining Co. v. Texarkana & Ft. S. Ry. Co., 261 S. W. 169;

Maryland Casualty Company v. Levine, 67 Fed. (2d) 816;

Pierce-Fordice Oil Ass'n. v. Brading, 212 S. W. 707;

Wilhoit et al. v. Iverson Tool Co., 119 S. W. (2d) 709;

Broaddus v. Long, 138 S. W. (2d) 1057;

Orris v. Tolerton v. Warfield Co., 207 N. W. 365;

Southern Bell Telephone & Telegraph Co. v. Quick, 149 So. Rep. 108;

Gammill v. Mullins, 188 S. W. (2d) 986;

Central Truckaway System, Inc. v. Moore, 201 S. W. (2d) 725;

Loper v. Morrison, 145 P. (2d) 1.

ARGUMENT

The evidence briefly summarized simply shows that the defendant's truck driver, Roy White, was instructed to deliver freight to Hill & Hill Motor Lines; that upon arriving at Hill & Hill Motor Lines, it was during the noon hour and there was no one there to deliver the freight to and White had orders from his employer not to deliver freight without someone being there to sign a receipt for same. This was the first time that White had ever been called out with freight during the noon hour.

The evidence is conflicting as to whether it was customary for him to take the company truck home to lunch, the evidence of the company's witnesses showing that it was a violation of orders and the evidence of his mother showing that he quite often and customarily brought the truck home. We feel that the DeFrates case, 125 S.W (2d) 282, relied upon by the Court and the Appellee, is easily distinguishable, Judge Hickman recognizing the distinction between the DeFrates case and the case at bar in the following language:

> "Many of the cases which are relied upon as departures from, or exceptions to the above rule may

be grouped into two classes, first, those in which the departure was not wholly disconnected from the employment, but in which there was a mingling of the personal purpose of the servant with the doing of the master's work, and, second, those in which the departure was but a deviation and not a complete turning aside. This case does not fall within either of these two classes, but is one of a complete departure for a purpose not connected with the employer's business and not with the employer's consent."

We think it quite obvious that the departure here involved, to-wit: going to said lunch while waiting for the employees of Hill & Hill to return so that he could deliver freight as instructed by his employer, could not, for any purpose, be considered a complete departure wholly disconnected with his employment but at the most, there was a mingling of the personal purpose of the servant with the doing of the master's work, and, second, the departure was but a deviation and not a complete turning and the employee was on his way to deliver the freight and had returned back to the zone of his employment at the time of the accident. Our two points are well supported by the following authorities: The cases speak for themselves so as to sustain our points:

In the leading Texas case of *Gulf Refining Company v. Texarkana & Ft. S. Ry. Co.*, Supra, the court said:

"While it is true, as is urged by appellant, that the testimony of the driver of the truck that he had

traveled two blocks away from appellant's warehouse *and was on his way to lunch at his mother's home* at the time the accident happened was not contradicted by any other testimony, *it is also true that the further testimony of said driver that he had an empty barrel and cans in the truck which it was his duty to return to appellant's warehouse, and that he went from the scene of the accident to said warehouse instead of to* his mother's home, was not in any way contradicted. It seems, therefore, that however far the driver may have intended to deviate from a direct route to the warehouse he in fact deviated only two blocks therefrom.

"By the rule applicable, 'where (quoting from Ritchie v. Waller, 63 Conn. 155, 28 Atl. 29 27 L. R. A. 161, 38 Am. St. Rep. 361), the deviation is slight and not unusual, the court may, * * * as matter of law, determine that the servant was still executing his master's business.'

"Considering the matter from the standpoint of what the driver did, instead of from that of what he said he intended to do, we think the trial court had a right to conclude that the deviation was 'slight' within the meaning of the rule, and therefore that it appeared as a matter of law that the driver was still executing appellant's business at the time of the accident. Long v. Nute, 123 Mo. App. 204, 100 S. W. 511; Fidelity & Casualty Co. v. Ry. Co., 207 Mo. App. 137, 231 S. W. 277; Mathewson v. Edison Co., 232 Mass. 576, 122 N. E. 743; Schrayer v. Bishop, 92 Conn. 677, 104 Atl. 349; Fisick v. Lorber, 95 Misc. Rep. 574, 159, N. Y. Supp. 722; Duffy v. Hickey, 151 La. 274, 91 South 733; Thomas v. Lockwood Oil Co., 174 Wis. 486, 182 N. W. 841.

If, however, we thought the character of the deviation should be viewed from the standpoint of what the driver of the truck said he intended to do, *we still would be of the opinion it appeared as a matter of law that the driver had not abandoned the performance of duty he owed appellant, and that his deviating from a direct route back to the warehouse with the intent to go to his mother's for lunch was a mere incident of service he was then performing for appellant, to-wit, returning the empty barrel and cans referred to to appellant's warehouse.* Schrayer v. Bishop, supra.

(3) And, if we thought the action of the trial court was not supportable on either of the views stated, *there is still another view which we think he had a right to take of the case as made by the testimony, and that is that the driver in using the truck* (loaded as it was with articles it was his duty to carry to appellant's warehouse) *for the purpose of going to his mother's to lunch, combined his own and appellant's business. If the* driver did that, appellant was liable as determined by the judgment. 18 R. L. L. 797; Barmore v. Railway Co., 85 Miss. 426, 38 South. 210, 70 L. R. A. 627; 3 Ann. Cas. 594, and note, page 607; Tuttle v. Dodge, (N. H.) 116 Atl. 627; Jones v. Lozier, 196 Iowa 365, 191 N. W. 103; Whimster v. Holmes, 177 Mo. App. 130, 164 S. W. 236."

The Huerta case, supra, by the Supreme Court of Texas, peculiarly supports our proposition as follows:

"We believe that that the rule appropriate to the peculiar facts of this case is that the relation of

master and servant, temporarily suspended by the servant's departure from his work to accomplish a purpose of his own not connected with his employment, *is re-established when he has returned to the place where the deviation occurred, or to a place where in the performance of the duties he is required to be.* This is the substance of the rule as stated in Corpus Juris, Vol. 42, pp. 1112, 1113, Sec. 871, and in Blashfield's Cyclopedia of Automobile Law and practice, Permanent Edition, Vol. 5, p. 212, 3051, which are cited in the opinion of the Court of Civil Appeals. The opinion is Southwest Dairy Products Co. v. DeFrates, 132 Tex. 556, 560, 125 S. W. 2d 282, 284, 122 A. L. R. 854, by the use of the phrase, 'returning to the zone of his employment', indicates recognition of the foregoing principle.

The texts of Corpus Juris and Blashfield's Cyclopedia, above cited, are well supported by authorities from other states. In one of the cases cited, the opinion was expressed that when the servant returned *'to a point that might be said to be within the zone of his employment', the master's liability for his acts afterward occurring in the conduct of the business was re-established.* Orris v. Tolerton & Warfield Co., 201 Iowa 1344, 207 N. W. 365, 368.

In another case, it was held that if the accident occurred when the employee was 'at a place where he might properly be,' were he confining his conduct strictly to the business of the employer, and if his movements at the place were impelled by a purpose to accomplish the employer's business, the jury was authorized to find that he was within the scope of his employment, although he had thereto-

fore deviated on an errand for a third person. Dale v. Armstrong, 107 Kan. 101, 190 P. 598.

The residence to which Andreau had gone to listen to the radio, although on the company's property, was somewhat removed from the buildings of the plant. When the boy was struck, Andreau had traveled a little more than 700 feet from the residence and had reached an open area surrounded by the buildings of the plant. He was on the company's road running east and west and between its office building and one of the machine shops to which he was going and where had work to do. The machine shop was 150 to 200 feet west of the point where the accident occurred and the office building was a shorter distance to the east. There were two other machine shops nearby, to the southwest and about 60 to 100 feet distanct. *Andreau was then within an area and at a place where the performance of his duties constantly took him. He had no particular place to work, his duties being to supervise other mechanics and to see that* the company's machinery was kept in good condition, and in the performance of those duties he went from place to place and from building to building as his own judgment directed. *He was, at the particular time, 'within the zone of his employment'* and about his master's business.

"The facts in Missouri, K. & T. R. Co. v. Edwards, Tex. Civ. App., 67 S. W. 891, in which writ of error was refused, are very similar to those in this case. While the plaintiff was standing near one of the defendant's passenger trains at a depot, where he had gone to meet some friends, defendant's brakeman, in the effort to board the outgoing train, care-

lessly ran into him and knocked him under the moving train. The defense was that the railway company was not liable because the brakeman was not then in the discharge of his duties. The brakeman's place of duty was on the opposite side of the train, but he had come to a saloon or restaurant on the side of the train where the accident occurred, and was hurriedly returning to board the train, then just moving away, when he ran against the plaintiff. The court held as a matter of law that, while the brakeman 'may not have been on his master's business in stepping aside to the saloon or restaurant, * * * he was when he ran over appellee in the effort to resume his accustomed place of service'."

In the Texas case of *Collin County Motor Company v. Howard*, supra, the court said:

"We believe that, under the facts of this case, Franklin, at the time of the collision, had resumed his employment, which had been effectually interrupted by his stepping aside on missions purely his own, and was then engaged in the performance of duty or work for his master in his sojourn home with his master's automobile. Franklin's employment as salesman for the Collin County Motor Company was unlimited as to the time he was allowed to work, that he was expressly authorized to retain possession of his employer's automobile and became responsible for its safekeeping and return. Franklin's duty on the day in question was to go to Dallas, *and it was equally his duty to return to McKinney.* His employment was not so restricted as to require him to return immediately, or at any specified time, on ces-

sation of his employer's errands; nor, did it prevent him from interrupting his employer's business for the time and performing missions of his own * * * he had taken up his master's duties—*gotten back on the highway to McKinney, over which he was expected to return*, and was driving home with his master's automobile when the collision occurred."

The Honorable Fifth Circuit in the Levine case, supra, in an opinion by Judge Hutcheson, recognized the rule announced in the following cases:

"* * * it is with equal universality held that, the deviation over, all injuries thereafter received are compensable. State Compensation Ins. Fund v. Industrial Comm., 80 Colo. 130, 249 P. 653; Railway Express Agency v. Lewis, 156 Va. 800, 159 S. E. 188, 76 A. L. R. 350; Stratton v. Interstate Fruit Co., 47 S. D. 452, 199 N. W. 117; Webb v. North Side Amusement Co., 298 Pa. 58, 147 A. 846; Self v Shirkie Coal Co., 89 Ind. App. 673, 166 N. E. 613; Federal Mutual Liability Ins. Co. v. Industrial Accident Comm. 94 Cal. App. 251, 270 P. 992; Southern Casualty Co. v. Ehlers, (Tex. Civ. App.) 14 S. W. (2d) 111."

In the Levine case, the court further stated as follows:

"It is argued, however, that because he deviated by continuing west after he reached Main Street, along which his proper course lay, in order to go into the San Felipe district on private business of his own, he broke the continuity of his employment, and, going beyond its scope, abandoned the protection

of the compensatory coverage; that, having abandoned, it he did not return to its protection until he reached the place where he was to resume work; that on the way there he was merely one of the general public outside of his employment and the protection of its coverage.

"This will not do. The jury found, upon ample supporting evidence, that Levine was, when killed, on the direct route to the place to which he had been sent on company business. *Thus it stands established that, the only deviation at an end, he had resumed his route and duty,* and that the only reason for his being where he was when he was killed was the business of the company which, under direct injunctions from his employer, he was on his way to perform."

The Texas case of *Pierce-Fordice Oil Ass'n. v. Brading,* supra, is clearly in point. In that case the court said:

"If the deviation from such instructions amounts to an entire abandonment of the master's service, then the master is not liable; but if such deviation *is a mere incident to the discharge of a duty which the servant is performing at the time such departure occurs, and after the termination of which authorized service is resumed, then the master is liable.* * * * in the present suit, the trip of Ward to the post office in the automoblie to mail the report to his superior officers in Ft. Worth was one of the duties of his employment, *and he was resuming that journey after the temporary stop at the railway station when he ran the machine over the plaintiff.* Hence it cannot be said that the operation of the machine at the time

of the injury was a departure from and an abandonment of the master's service. * * * We conclude, further, that Ward's intention to continue his journey to his home in the automobile after mailing the papers at the post office did not fix and determine the legal character of his entire trip after leaving the warehouse as a trip exclusively for his own convenience, and not in the interest of the company. * * * If it was Ward's duty to assist in the preparation and mailing of the invoice during the night of the accident, which appellant does not deny, then we perceive no room for reasonable doubt that the trip was made within business hours, especially in the absence of any proof that the performance of such services at that hour of the night was forbidden by the defendant."

"In the case of Broaddus v. Long, by the Supreme Court of Texas, 138 S. W. (2) 1057, the undisputed evidence showed that the taxi driver was driving a cab as an accommodation for another taxi driver's benefit after he had checked in the cab he was supposed to drive without the knowledge and consent of his employer. The Supreme Court said on page 1059 of the opinion: 'We have carefully examined this record in regard to the testimony therein contained and in our opinion even to admit that such evidence, if believed by the jury, would constitute a complete defense for Broaddus in this action * * * STILL WE DO NOT THINK THAT SUCH EVIDENCE COMES FROM WITNESSES WHO UNDER THE CIRCUMSTANCES IN THIS RECORD, THE JURY WAS BOUND TO BELIEVE.'

"The case of Orris v. Tolerton v. Warfield Co., 207 N. W. 365, is a case recognized as authority then controlling by the Supreme Court of Texas in Chisos Mining Co. v. Huerta, which we have quoted to the Court. In that case the Court said:

" 'The undisputed facts that the truck belonged to defendant, that Taylor was employed by defendant to operate it, *and with it to deliver merchandise over the city, together with the fact that the accident occurred within the territory in which he was employed, and during hours within which deliveries were or might be made,* would justify the jury in inferring that Taylor, at the time of the accident, was in the line of his employment. Landy v. Oversen, 174 N. W. 255, 187 Iowa 285; Baldwin v. Parsons, 186 N. W. 665, 193 Iowa 75; Curry v. Bickley, 195 N. W. 617, 196 Iowa 827; Mooney v. Canier, 197 N. W. 625, 198 Iowa 251; Napier v. Patterson, 196 N. W. 73, 198 Iowa 257. See further Stumpf v. Montgomery, 226 P. 65, 101 Okl. 257, 32 A. L. R. 1490; Lee v. Pierce, 239 P. 989, 112 Okl. 212.'

"Disregard of instruction, or mere deviation by Taylor from his tract line of duty, though for purposes of his own, would not of itself relieve defendant from responsibility. *The departure must have been so substantial as to amount for the time being to an abandonment of the business of the defendant and to the serving of some purpose wholly independent of it.* Jones v. Lozier, 191 N. W. 103, 195 Iowa 365; Curry v. Bickley, 195 N. W. 617, 196 Iowa 827; Rowland v. Spalti 194 N. W. 90, 196 Iowa 208; Traynor v. Keefe Construction Co., 202 N. W. 218, 199 Iowa 575; Baker v. Allen, 131 N. E. 551, 231

161, 28 Am. St. Rep. 361, 27 L. R. A. 161; Loomis v. Hollister, 55 A. 561, 75 Conn. 718; Thomas v. Lockwood Oil Co., 182 N. W. 841, 174 Wis. 486; McKeage v. Morris (Tex. Civ. App.) 265 S. W. 1059; Gulf Refining Co., v. Texarkana, etc. Co. (Tex. Civ. App.) 261 S. W. 169.

"Whether the servant at a given time is acting within the scope of his employment must usually be decided, not only from the established facts, but from presumptions and inferences raised by them. The question is usually one of fact for the jury, and rarely one which may be disposed of by the Court as a matter of law. Seybold v. Eisle, 134 N. W. 578, 154 Iowa 128, 135 Ann. Cas. 1914-a, 1097; Gulf Refining Co. v. Texarkana, etc. Co., (Tex. Civ. App.) 261 S. W. 169; Michel v. Southern Lumber Co., (N. Y. Sup.) 127 A. 580; Venghis v. Nathanson (N. J. Err. & App.) 127 A. 175; Ritchie v. Waller, 28 A. 29, 63 Conn. 155, 27 L. R. A. 161, 38 Am. St. Rep. 361; Loomis v. Hollister, 55 A. 561, 75 Conn. 718; McKeage v. Morris, (Tex. Civ. App.) 265 S. W. 1059; 13 C. J. 1361, 1362. If Taylor at the time of the accident was acting in the course of and within the scope of his employment defendant would be liable for his negligence, notwithstanding the fact that he might at the same time have been serving some purpose of his own. Jones v. Lozier, 191 N. W. 103, 195 Iowa 365; McKeage v. Morris, (Tex. Civ. App.) 265 S. W. 1059; Thomas v. Lockwood Oil Co., 182 N. W. 841, 174 Wis. 486; Gulf Refining Co. v. Texarkana etc. Co. (Tex. Civ. App.) 261 S. W. 169.

"The deviation claimed was at most a suspension or temporary abandonment by Taylor of the defend-

ant's service. If Taylor in going to his mother's house for the bed spring did totally depart from defendant's business of his own exclusive purpose, the relationship of master and servant was restored when he returned to the point of departure *or the zone of service as it was when he left it, for it remained his duty to take the truck thence to his home.* When he returned to that point or *to a point that might be said to be within the zone of his employment on that occasion* and was engaged in taking the truck to his home, the defendant's liability for his acts afterward occurring in the conduct of the business was re-established. Curry v. Bickley, 195 N. W. 617, 196 Iowa 827; Riley v. Standard Oil Co., 132 N. E. 97, 231 N. Y. 301, 22 A. L. R. 1382; Bormore v. Bicksbury, etc. Co., 38 So. 210, 85 Miss. 426, 70 L. R. A. 627, 3 Ann. Cas. 594; Thomas v. Lockwood Oil Co., 182 N. W. 841, 174 Wis. 846; Cummings v. Republic Truck Co., 135 N. E. 134, 241 Mass. 292."

"We do not think the Court was warranted on this record in ruling as a matter of law *either that Taylor in going to his mother's house did depart from the line of his employment to such an extent as to relieve the defendant from responsibility for his conduct on his way back to his own home with the truck,* or that he had not at the time of the accident resumed performance of the duties of his employment."

In *Southern Bell Telephone & Telegraph Co. v. Quick,* 149 So. 109, the Court held:

"But in by far the greater number of cases where the question of the master's responsibility turns, as in the present case, principally upon the mere extent

of deviation by the servant from the strict course of his employment or duty, it has been generally held to one of fact and not of law. In such it is, and must usually remain, a question depending upon the degree of deviation and all the attendant circumstances. In cases where the deviation is slight and not usual, the court may and often will, as a matter of law, determine that the servant was still executing his master's business. So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such questions."

"In the recent case of Loper v. Yazoo & M V. R. Co., (Miss.) 145 So. 743, in discussing the meaning of the phrase 'Scope of employment,' the Court held that this phrase 'adopted by the courts for the purpose of determining a master's liability for the acts of his servants, had 'no fixed legal or technical meanings,' 399 C. J. 1282; and '*the ultimate question is whether it is just that the loss resulting from the servant's acts should be considered one of the normal risks of the business in which the servant is employed which that business should bear.*' A. L. I. Rest. Agency, Tent. Draft No. 5, p. 53. The matters of fact usually taken into consideration in answering this question are set forth in Sec. 454, A. L. I. Rest., supra, one of which is 'whether the master had reason to expect that such will be done.' Little, if any difficulty arises therein except in cases, as here, wherein the servant's conduct was in excess of that authorized. The concensus of authority, and the rule of this

court, is the fact that a servant's conduct was unauthorized does not bring it without the scope of his employment, *provided it is 'of the same general nature as that authorized, or incidental to the conduct authorized.'* (Citing authorities)

"The difficulty of applying the legal rules to the ever varying facts and circumstances which present themselves is well illustrated by the fact that in the very able and exhaustive briefs of counsel in this case, in many instances, cases are cited from the same jurisdictions as tending to support the contention of the respective parties, the decision in each case being shaded and controlled by the particular facts presented, and for that reason it will be impossible within the compass of an opinion of reasonable length to undertake to set forth the facts and to distinguish this long list of cases from state and federal jurisdiction.

"In the case at bar, facts were established from which the prima facie presumption arose, that, at the time of the accident, the servant was acting within the scope of his employment and was engaged about his appointed duties. To meet the burden thus cast upon it to show that its servant was not about his master's business, *the appellant Co. relied solely upon the testimony of the servant. This servant, also a defendant, was hostile to the appellee, and his testimony was full of contradictions, and he was so thoroughly contradicted by other witnesses in material respects that the jury might well have been warranted in rejecting his testimony as to his mission, the instruction given him by the master, and the customary use of the automobile by him and the knowledge of the master of that fact.*

"The fact is that Johnson, the telephone company's manager of the Meridian plant and territory, who was said to have given Stewart orders on the occasion in question, and who was in the best position of any one to know of the facts with reference to these matters, was in the courtroom during the trial, but was not offered as a witness; and the failure of the defendant company to present this witness who was present and who was friendly to it, and who knew exculpatory facts, if any one did, raised a strong presumption that such facts do not exist. Anderson v. Tele. & Telegraph Co., 86 Miss. 341, 38 So. 786. To like effect see also Hicks v. Nassau Elec. Ry. Co., 47 App. Div. 479, 62 N. Y. S. 597; Northern Pac. Ry Co. v. Craft, (C. C. A.) 69 F. 124; Grainesville, etc. Rr. Co. v. Wall, 75 Ga. 282.

"The proof shows that the master furnished the servant an automobile for use in the discharge of his appointed duties; that for a long period of time he had been permitted and expected to use and drive this automobile over the streets of the city of Meridian without any directions as to the route he should travel; that his superior knew where he resided, and that he customarily went to his residence for his meals. On the occasion in queston, the regular lunch hour of both Stewart and his superior, Johnson, had passed, and Johnson could not be relieved at the power board until the servant Stewart, reported at the plant for that purpose. At the time the supposed order was given, Johnson knew that Stewart had the automobile and was at a point nearly midway between the warehouse and his residence, where he would get his lunch. He knew that,

in order for Stewart to store the automobile in the wareroom and then go to his residence for lunch, it would be necessary for him to drive six or seven blocks west and then, unless some uncertain means of transportation could be secured, return on foot over the same route to the point where he had been working and ten city blocks beyond, requiring him to walk more than thirty-two city blocks on this June day before he could report to the plant and relieve his superior who was working overtime and long past his usual lunch hour. At the time of the accident, there was in the automobile which the servant was driving, tools, wires and equipment belonging to the master, which it was his duty to care for and deliver, along with the automobile to the warehouse; and, it does not appear that the servant had abandoned his duty and ultimate purpose.

"The collision occurred within ten minutes after Stewart received the order to get his lunch and report to the plant, *and within six city blocks of the place from which he started to his residence, and, under the circumstances herein set forth, we think the master should reasonably have expected that the servant would use the automobile for the purpose indicated. Any other course of action on the part of the servant would have been the unexpected, and, in fact, the improbable, and we are of the opinion that it was proper to submit to the jury the question of whether or not, under all the facts and circumstances, the act* of the servant in using the automobile was an act which the master had reason to expect would be done, and was so closely connected with and incidental to the discharge of the servants' appointed duty as to con-

stitute a mere deviation from the scope of his employment, and not a total departure therefrom.

"Many cases from other jurisdictions, wherein the facts are somewhat analogous, support the view above stated. In the case of Bryan v. Bunis, 208 App. Div. 389, 203 N. Y. S. 634, one of the defendants, about the noon hour, directed his employee to take him from the shop to his home in an automobile truck owned by the defendant, and when this had been done, he instructed the employee to take the truck back to the shop. But, instead of returning directly, the employee started to his home for dinner, which was a deviation of about a half mile. While making the journey to the employers' home, the truck struck and injured the plaintiff, and, in passing on the questions presented on appeal from a judgment in favor of the plaintiff, the court said:

" 'In determining whether or not liability exists under given circumstances, no hard and fast rule on the subject, either of time or space, can be applied. *The choice of a different way back does not, as a matter of law, constitute an abandonment of the master's work.* Riley v. Standard Oil Co., 231 N. Y. 301, 132 N. E. 97, A. L. R. 1382. Courts will not be limited by tests that are merely mechanical or formal; and its judgment, though it may be guided by location in time and space, will not be controlled by such circumstances, if there are others that characterize the intent of the transaction. Fiocco v. Carver, supra, at pg. 223 (of 234 N. Y.) 137 N. E. 310.'

" ' *In this case the defendant, directing the servant's movements, knew that the usual hour of meal time was at hand. He knew where the chauffeur lived.*

*Certain employees are by law given a fixed period for the noon day meal. * * * Custom has decreed a similar period for others. This defendant knew that Evans was allowed the time from 12:00 to 1:00 for such purpose. The comparatively slight deviation by Evans of a half mile from the direct route back to the shop, in order that he might obtain his usual noonday meal, was not an engagement in a new independent enterprise, or an abandonment of his master's work.* It was a part of his daily duty, and when his employer took him from the shop at the noon hour, and, after his immediate errand was performed, directed him to return, *it was within his contemplation that the ambit of the chauffeur's duty would not require him to be back at the shop until 1:00 o'clock, and that in the meantime, at some place presumptively his home, he would obtain his midday meal.* His employment was not changed at least as a matter of law, by going to his home on this errand. Pallocco v. Lehigh Valley R. R. Co., 236 N. Y. 110, 140 N. E. 212. To go at the usual time for a meal (Sundine's case, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916a 318) and to his home after the day's work is done (Erie R. Co. v. Winfield, 244 U. S. 170, 37 S. Ct. 556, 61 L. Ed. 1057, (Ann. Cas. 1918b 662)) are incident of employment.'

" 'We have recently held that a slight deviation, even for the servant's own benefit, from the course of work required by the master, will not necessarily relieve the master from the liability for an accident occurring during such deviation. Bush v. Sinclair Rooney & Co., 207 App. Div. 699, 201 N. Y. S. 804. The jury found here, under proper instructions, that Evans had not abandoned the employment of the de-

fendants when the accident occurred. *The deviation, therefore, was but temporary, and the objective of Evans was the shop to which his duty and his master's direction called him at 1:00 o'clock.*' In Baum v. Schweitzer, 124 Misc. 516, 208 N. Y. S. 549, the court said: 'In the present case the defendant's business was the selling of game and similar provision to hotels and other consumers. The chauffeur was called upon to begin work very early in the day, and the hours of the actual deliveries to be made by him consumed the entire day. That he went to lunch at a somewhat unusual hour does not, under these conditions, indicate that as a matter of law his stopping for lunch was not within the contemplation of the employment. To go 17 blocks in an automobile in the city of New York is a detour requiring not over 10 or 15 minutes of time. * * *

" '*There are some aspects of the testimony which throw doubt upon the correctness of the defendant's version of the facts which has been assumed herein. It was for the jury to pass both upon the correctness of this version and upon the further question whether the deviation, if it occurred, was so material as to constitute a frolic rather than a detour.*'

"In the case of Butler v. Hyperion Theatre Co., 100 Conn. 511, 124 A. 220, it was held that the question of whether or not the conduct of the servant was in the execution of the master's business within the scope of his employment was properly submitted to the jury; and the facts upon which this holding was based sufficiently appear from the following quotation from the opinions:

" 'The defendant claims that the evidence shows that Garrison (his employee) had specific directions to bring the car to the front of the Hyperion Theatre on Chapel St. at noon of each day and leave it there during the luncheon hour, and then go and get his lunch and return for the car and new instructions; that on this day he did not bring the car and leave it in front of the theatre at noon, but used the car at that time and started to go to his home in it for lunch, contrary to his unmodified instructions. The defendant claims that these facts show that at the time of the collision he was not using the car in the execution of the defendant's business, and therefore, the defendant was not liable for his negligence. * * * *Under the evidence in this case the jury could reasonably have found that Garrison, the servant, was delayed in his work on the forenoon of the day in question, and was late, and that he reasonably believed he could perform the essentials of his employment in billposting with greater advantage to his master if instead of driving late to the theatre at lunch time, he drove first to his home and lunched and then drove to the theatre for instructions for his afternoon work, and that solely with the intent to further and aid in the performance of his master's business, he adopted that course of conduct.* It is apparent, therefore, that the jury could reasonably have found that at the time of the collision Garrison was engaged in the execution of the master's business within the scope of his employment, and it could not be questioned that with such a finding a veridct for the plaintiff could reasonably have been found.'

"Many other cases might be cited holding that the question of whether or not the servant was in the

execution of his master's business within the scope of his employment, was one of fact to be determined by the jury, among them being the following: Wagnitz v. Scharetg, 89 Cal. App. 511, 265 P. 318; Begrens v. Hawkeye Oil Co., 151 Minn. 378; 187 N. W. 605; Boehmer v. Short, 184 Ark. 672, 43 S. W. (2d) 541; Kavale v. Morton Salt Co., 329 Ill. 455, 160 N. E. 752; Crowell v. Duncan, 145 Va. 489; 134 S. E. 576; 50 A. L. R. 1425; Dockweiler v. American Piano Co., 94 Misc. 712, 160 N. Y. S. 270; Perry v. Haritos, 100 Conn. 476, 124 A. 44; Barney v. Magenis, 241 Mass. 268, 135 N. E. 142; Dennis v. Miller Automobile Co., 73 Cal App. 293, 238 P. 739; Kruse v. White Bros., 81 Cal. App. 253 P. 178; Edwards v. Earnest, 208 Ala. 539, 94 So. 598; Barz v. Fleischmann Yeast Co., 308 Mo. 288, 271 S. W. 361; Peterson v. R. Co., 265 Mo. 462, 178 S. W. 182; Drake v. Norfolk Steam Laundry Corp., 135 Va. 354, 116 S. E. 668; Loomis v. Hollister, 75 Conn. 718, 56 A. 561; Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016, 26 L. R. A. (N.S.) 382, 19 Ann. Cas. 1227; Nord v. West Mich. Flooring Co., 238 Mich. 669, 214 N. W. 236; Jordan Stabler Co. v. Tankersly, 146 Md. 454, 126 A. 65; *Gulf Refining Co. v. Texarkana & Ft. S. Ry. Co., (Tex. Civ. App.) 261 S. W. 169;* Fleischmann Co. v. Howe, 213 Ky. 110, 280, 496, Blaker v. Philadelphis Elec. Co., 60 Pa Supere. Ct. 56."

The Honorable Circuit Court of Appeals for the Fifth Circuit, in the case of *Standard Coffee Co. v. Trippet*, 108 F. (2d) 161, a case in which Justice Hutcheson and Justice Holmes participated in the decision, held:

> "The jury had the right and may have discredited his testimony as being inherently improbable. The rebutting testimony was not so clear, positive, and unequivocal as to warrant, as a matter of law, the overturning of the presumption arising from the ownership and operation of the automobile. Under all the facts and circumstances of this case, we think it clear that the issues raised were properly submitted to the jury."

This case finds full support in a case by the Supreme Court of Texas decided since the decision in the DeFrates case and the decision being by Justice Critz and the case being that of *Broaddus v. Long*, 138 S. W. (2d) 1057, in which Judge Critz held in substance:

> "In a case where the defendant offered evidence to overturn the presumption involved and to show that the taxicab driver was wholly on a mission of his own, that the jury did not have to believe the evidence which came from the witnesses who attempted to rebut the presumption and that hence, the case was for the jury."

Of course, the rule is well established in Texas, according to 5 Tex. Jur., Pg. 778, that:

> "If, within the course of his employment, an employee is permitted to use his employer's vehicle to facilitate the performane of necessary errands of his own, he does not, while on this errand, cease to be an employee but is still an employee and the legal principle of respondeat superior applies."

This has been held to be true where the driver would take the company car home for lunch. The Texas case of *Davis v. Jeffords-Schoenmann Produce & Brokerage Co*, 261 S. W. 401, is cited in which the Court said:

> "The particular use he was making of the car at the time of the accident, going to his lunch in it, was not only one he was expected by them to make of it, but they had turned it over to him during the noon hour for that purpose, and he was to so go to his lunch in that neighborhood, when he made or was out on a delivery for them, whenever the noon hour struck. He could not therefore be said to have been on an errand exclusively his own, but at least was so mingling his master's business with his own incidental interest in going for lunch in a conveyance they had furnished him for the convenience of both in that respect as that, for the brief time involved, the relation of master and servant was not broken or terminated."

We have proof in this case which would justify the inference which is required, that is, the one most favorable to the plaintiff that White, who lived with his mother, would always come home in a truck belonging to the Strickland Transportation Company. (R. Pg. 34) In addition to that, White also testified that this was the first time that he had ever been called out at 12:00 and didn't know what he should do with the truck under such circumstances. The interest of the Strickland Transportation Company in wanting the men to get back from their

lunch in a hurry is shown by the testimony of J. T. Welsh heretofore set out in the Statement. At the conclusion of the witness, Welsh's testimony, the following question and answer was given which shows conclusively that White was never directly instructed not to take the company truck home for lunch:

"Q. You have been on the stand about thirty minutes?

A. I don't know.

Q. And you have testified as to all instructions that were given them and you never mentioned that particular instruction except on this last statement when he asked you if they made that direct instruction, isn't that right; in other words, you have constantly stated in the presence of the jury when you were asked what instructions were given, that the only instructions were not to use the truck except on company business.

A. Not to take it home for lunch, that would be off of company business." (R. Pg. 23)

The above testimony is not clear, positive and unequivocal that White had been instructed not to take the car home for lunch hence, this matter was for the jury.

This is particularly true under the Texas decisions, for instance, in the recent case of *Gammill v. Mullins*, 188 S. W. (2d) 986, the court citing a great number of Texas cases, said:

> "While the jury has no right arbitrarily to disregard the positive testimony of unimpeached and uncontradicted witnesses, the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury . . . . Stated in another form, the rule, uncontradicted, uncorroborated testimony of a party to a suit will not authorize or support instructed verdict for him."

We feel, however, that if the court holds that we are in error in the above proposition, that the Supreme Court of Texas, in a far more recent case than the DeFrates case, to-wit: the case of *Chisos Mining Company v. Huerta*, 171 S. W. (2d) 867, has conclusively ruled when the law in that case is applied to the facts here that White had returned to the zone of his employment. This language from the Huerta opinion, coming from the Supreme Court settles this matter as follows:

> "In another case, it was held that if the accident occurred when the employee was at a place where he might properly be, were he confining his conduct strictly to the business of the employer and if his movements at that place were impelled by a purpose to accomplish the employer's business, the jury was authorized to find that he was within the scope of his employment although he had theretofore deviated on an errand for a third person."

The above evidence heretofore set out shows that White had reached the place where he might properly be, were

he confining his conduct strictly to the business of his employer. They further show that his movements at that place were impelled by a purpose to accomplish the employer's business, to-wit, enroute to Hill & Hill to deliver the freight that he had been ordered to deliver by his employer and that he had been prevented from delivering due to the absence of Hill & Hill employees. They further laid down the rule that by the term, "zone of employment" was meant a place where the employee, in the performance of his duties, would constantly be.

The Supreme Court of Texas cites the case of *Dale v. Armstrong*, 190 P. 598, in the Huerta case, which decision was decided after the DeFrates case, relied upon by appellee, was decided and in which the Supreme Court of Texas discuss the holding in the DeFrates case. The Supreme Court rejects the contention made by the appellee in this cause by placing their firm stamp of approval upon the case of *Dale v. Armstrong*.

Upon oral argument before the Fifth Circuit the argument was made by Appellees counsel that White would not have been where he was and the accident would not have happened had it not been for the deviation. At this time Judge Hutcheson made the remark that it was a question of whether or not respondeat superior depended upon causation or representation; that there was no question but that at the time of the accident he was representing his employer. Causation does not enter into this matter as con-

tended by Mr. Fullingim under the decision in the Armstrong case in which the Court said as follows:

> "The defendant contends that he was not allowed to present his case fairly to the jury, because of the exclusion of material evidence. Morris was not permitted to testify that in delivering the box he would not have been at Central and Emporia avenues, where the accident occurred, if he had not gone on the errand for Handley, and that, if the accident had not occurred, he intended to go east on Central Avenue to St. Francis, south on St. Francis to Second, east on Second to Cleveland, north on Cleveland to Central, and then east on Central to Mathewson. The offered evidence was not material."

The Supreme Court of Kansas then used the words which were adopted by the Supreme Court of Texas as follows:

> "If the place where the accident occurred were a place where the driver, confining his conduct strictly to the business of delivering the box, might properly be, and if when at that place his movements were impelled by a purpose to deliver the box, the jury was authorized to say he was then within the scope of his employment."

The Court further says:

> "Intention and locality concurred to place him there. WHETHER OR NOT HE WOULD HAVE BEEN THERE BUT FOR THE DEVIATION, AND WHAT COURSE CONVENIENCE MIGHT HAVE SUGGESTED HE SHOULD TAKE FROM THERE

ON, WERE NOT IMPORTANT, There are authorities which would sustain a finding of fact that Morris was within the scope of his employment from the time he left Handley's house, but it is not necessary to approve or disapprove them. THE QUESTION OF WHEN THE COURSE OF DEVIATION HAS TURNED BACK INTO THE COURSE OF EMPLOYMENT IS A QUESTION OF FACT AND THE OBSERVATIONS JUST MADE ARE WELL WITHIN ANY REASONABLE RULE. Whatever may be said respecting the propriety of the court's rulings, the offered evidence was sufficiently covered by testimony which Morris was permitted to give. He described two so-called usual and ordinary routes of travel from the defendant's place of business to the place where the box was to be delivered, NEITHER ONE OF WHICH WOULD TOUCH THE PLACE OF THE ACCIDENT, and he then described what route he would take in making the delivery.

"After weighing the testimony, the jury was satisfied the route by way of Topeka Avenue to Central, and then east on Central to Mathewson, was just as 'usual and direct, regular and proper,' as any other, and so found."

In this case the appellee contends that had he gone to the company warehouse he would have then been within the scope of his employment, whereas, in taking the shorter and more direct route which White did take, he was actually much nearer to the completion of the company's business than he would have been had he gone back by the company warehouse. The mere fact that he went out of

the way to go back by the company warehouse on his way to his sister's house to lunch casts suspicion upon his story that he was supposed to leave the company truck during the lunch hour at the warehouse.

We think that under the recent case of *Loper v. Morrison*, 145 P. (2d) 1, that White was never at any time out of the scope of his employment. Secondly, we think that under the Huerta case he had definitely returned to the scope of his employment so as to render the master liable and thirdly, we respectfully submit that the circumstances of this case, the explanation of which, by the defendant, under the Texas authorities, was not sufficient to overcome the presumption and inferences of fact to be indulged in from the proof presented and in the alternative, we think that the case should be remanded so that the evidence as to how often he carried the truck home to lunch might be more fully developed.

CONCLUSION AND PRAYER

The above cases fully demonstrate that the Fifth Circuit has refused to follow the Texas decisions on a very important point of local law since it is involved in practically every automobile accident that occurs and we feel that this Honorable Court should review this case by grant-

ing a writ of certiorari and reversing the said decision for a new trial on the merits thereof.

Respectfully submitted,

.....

DORSEY HARDEMAN
McBurnett Building
San Angelo, Texas

.....

JOHN J. WATTS
P. O. Box 1031
Odessa, Texas
Attorneys for Petitioner,
Woodrow V. Stone

.....

DORSEY HARDEMAN
Of Counsel

A copy of the petition for writ of certiorari and brief in support thereof has been furnished to John R. Fullingim of Amarillo, Texas, attorney for Respondents.

.....

JOHN J. WATTS

FILE COPY

FILED
SEP 9 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

NO. 210

MRS. WOODROW VIRGINIA STONE, *Petitioner*

VS.

STRICKLAND TRANSPORTATION COMPANY, *Respondent*

RESPONDENT, STRICKLAND TRANSPORTATION COMPANY'S OPPOSING BRIEF FILED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, BY MRS. WOODROW VIRGINIA STONE.

SIMPSON CLAYTON & FULLINGIM
Barfield Building
Amarillo, Texas
Attorneys for Respondent
Strickland Transportation
Company

CLEO G. CLAYTON, SR.
AND
JOHN R. FULLINGIM
OF COUNSEL

E. Duncan & Co., Brief Printers, Dallas

INDEX

CITATIONS

Cases:

	Page
Alfano vs. International Harvester Company, 121 S. W. (2), 466	37
Bishop vs. Farm & Home Saving & Loan Association, 75 S. W. (2), 285	14-15
Bowers vs. Bingham, 159 S. W. (2), 756	38
Chisos Mining Company vs. Huerta, 171 S. W. (2), 867	4, 21
Curry vs. Geckley, 195 Mo., 617; 198 Ia., 827	24
Gammill vs. Mullins, 188 S. W. (2), 986	22
Houston News Company vs. Shavers, 64 S. W. (2), 384	36-37
Hudson vs. Ernest Motor Company, 115 S. W. (2), 1167	37
Koenig vs. Marti, et al, 103 S.W. (2), 1023	40
Langford vs. El Paso Packing Company, 1 S. W. (2), 476	39
Marsh vs. American National Insurance Company, 16 S. W. (2), 333	28
Maryland Casualty Company vs. Levines, 67 Fed. (2), 816	32

INDEX (Continued)

	Page
McCoy vs. Beech-Whitham Company et al, 22 S. W. (2), 714	28
Missouri-Kansas-Texas RR Company vs. Salsman, 58 S. W. (2), 1026	28
Moody vs. Kimball, 173 S. W. (2), 270	39
Pesot vs. Yanda, et al, 126 S. W. (2), 240	25-27
Pyland vs. Sayers, 148 S. W. (2), 450	40-41
Pyle vs. Phillips, 164 S. W. (2), 569	42
Robelin vs. Brooke, 201 S. W. (2), 98	40
Southwestern Bell Telephone & Telegraph Company vs. Quick, 149 Southern, 109	33
Southwestern Dairy Products Company vs. Defratees et al, 125 S. W. (2), 282	16-21
Standard Coffee Company vs. Trippett, 108 Fed. (2), 161	34-36
Texas News Company vs. Lake, 58 S. W. (2), 1044	37
Valencia vs. Western Union Telegraph Company, 172 S. W. (2), 86	22

INDEX (Continued)

Page

Miscellaneous:

Blashfield's Cyclopedia of Automobile Law & Practice, Vol. 5, page 199, Sec. 3042 23

Blashfield's Cyclopedia of Automobile Law & Practice, Vol. 5, page 212, Sec. 3151 23-24

5 Texas Jurisprudence, page 778 33

1941 Texas Jurisprudence Supplement, page 422 22

IN THE

Supreme Court of the United States

NO. .....

MRS. WOODROW VIRGINIA STONE, *Petitioner*

vs.

STRICKLAND TRANSPORTATION COMPANY, *Respondent*

RESPONDENT, STRICKLAND TRANSPORTATION COMPANY'S OPPOSING BRIEF FILED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, BY MRS. WOODROW VIRGINIA STONE.

TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, Strickland Transportation Company, respectfully presents this, its opposition brief, in opposition

to petition for Writ of Certiorari from the United States Circuit Court of Appeals for the Fifth Circuit, filed by petitioner in above styled matter, opposing, and in opposition to this Court granting said writ and reviewing the judgment entered by the said Circuit Court of Appeals, same being dated the 13th day of April, 1948, and rendered in Cause No. 12,219, styled Woodrow V. Stone vs. Srtickland Transportation Company.

Respondent concurs in the short statement of the nature and results of the suit on the part of petitioner in her petition, but desires to elaborate on same as follows: This suit was by Mrs. Woodrow V. Stone, an unmarried woman, against Strickland Transportation Company, a corporation, and Roy White, she contending that on the occasion in question Roy White was driving a truck belonging to Strickland Transportation Company; that he was an employee of said Strickland Transportation Company, and was acting in the course and scope of his employment as an employee of said company on the occasion in question; that he negligently drove and propelled said truck into a car in which she was riding, resulting in serious, permanent injury to her. Respondent, as pleading, contends that the said Roy White on the occasion in question was not acting in the course of his employment and was performing no duties in the furtherance of the affairs, business, trade, or profession of said respondent; that he had deviated from and had not returned to the

scope and course of such employment, and was on a mission and performing activities solely personal to himself.

At the conclusion of all the testimony offered upon the trial of said case, Respondent, Strickland Transportation Company, made a motion for an instructed verdict, taking the position that petitioner had failed to establish by competent evidence that Roy White on the occasion in question was acting in the course and scope of his employment for respondent; that he was driving the truck in question without the knowledge and consent of said respondent. The trial court granted this motion. Roy White testified by oral deposition, but did not appear otherwise in the trial of said case, and did not interpose a defense in his behalf. After the court had granted the motion of Strickland Transportation Company for an instructed verdict, judgment was entered denying petitioner recovery against respondent, but awarding petitioner judgment against Roy White in the sum of $135,000.00. Roy White made no appearance in the Circuit Court of Appeals.

It is the position of respondent that the decision of the Circuit Court of Appeals in this case does not conflict with decisions of other Circuit Courts of Appeals on similar matters. The decision has not decided important questions of local law in a manner in conflict with decisions of the Texas Courts. Said Circuit Court has not decided important questions of general law in a manner that is

in conflict with weight of authority, and said opinion is not such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The trouble petitioner is having in this case stems from the apparent inability of herself and her counsel to apply the present announced rules of Texas law to the facts in the case at bar. This is strikingly portrayed on page 28 of petitioner's supporting brief, wherein the case of *Chisos Mining Company vs. Huerta*, reported 171 S. W. (2), page 867, is referred to and quoted from, and part of the quoted portion of the opinion there found being:

> "We believe that the rule appropriate to the peculiar facts of this case is that the relation of master and servant, temporarily suspended by the servant's departure from his work to accomplish a purpose of his own not connected with his employment, is reestablished when he has returned to the place where the deviation occurred, or to a place where in the performance of the duties he is required to be."

It is respondent's position that this is the settled Texas law as now pronounced on this question, and apparently attorneys for petitioner join us in this pronouncement. Also, it appears that the Circuit Court of Appeals which decided this case concurs in this view, since it cited this case in support of its decision in the case at bar.

The facts as to whether respondent's employee was acting in the scope and course of his employment on the oc-

casion in question and whether or not he had deviated from the course of his employment and if he had deviated, whether or not he had returned to the point of deviation or to a place where in the performance of his duties he should have been, are plain, simple, and undisputed, and are briefly as follows:

J. P. Welch, witness called by respondent on the trial of this case, in answer to Direct Interrogatories in part said:

"Q. State your name.

A. J. P. Welch.

Q. Where do you live?

A. Dallas, Texas.

Q. By whom are you now employed?

A. I am working for Herring Transportation Company. R. 8

Q. Did you live in Amarillo, Texas in the past?

A. I was only there about two months.

Q. By whom were you employed while there?

A. Strickland Transportation Company.

Q. What position did you hold as an employee of this concern?

A. I was general operations manager.

Q. During the time that you were manager for Strickland Transportation Company here in Amarillo, did you have occasion to hire a boy to work for this company by the name of Roy White?

A. Yes, sir.

R. 9

Q. I wonder if you would come over here somewhere where you can give the jury (referring to a map) where this happened. (By agreement, this is a map of a portion of the City of Amarillo, reflecting the streets, railroads, and highways, and the place where the defendant's place of business was, accident happened, etc.) Now, will you point out, please, sir, where Strickland Transportation Company's place of business was located on the date of the accident in question?

A. Here; approximately this location.

Q. Make a cross there with a lead pencil, please sir. That is number what on East Third Street?

A. 1507.

R. 11

Q. If he arrived down there at Hill Lines and there was no one to receive the freight, and it was between 12:00 and 1:00 o'clock, had you given any instructions to what he was to do with the truck and freight in the truck?

A. He had instructions to bring the truck and freight back to the dock.

R.12

Q. State whether or not when you employed Mr. White you gave him any instructions with reference to whether or not he could or could not use the company trucks down there for any type or mode of transportation other than company business?

A. They were emphatically given instructions that they were not to use them for any personal use; for business only for the company.

R. 9

Q. State whether or not he had been given positive instructions that he was not to drive this truck home to lunch.

A. He had been given definite instructions not to take the truck home to lunch.

R. 23

Q. Please show the jury the nearest route that would have gone to that place of business?

A. It would be go west to Grant and to 1101 Grant, and Hill's place is down in the 1300 block.

R. 12

Q. Then if the accident happened here where 10th Street intersects the Fort Worth Highway, in actual distance measuring 300 feet to the block, how far from Hill Transportation Company's trucking place of business there, or approximately how far was it, this boy was at the time of the accident?

A. Approximately a mile—16 or 17 blocks—approximately a mile.

R. 12

Q. If that boy had followed his instructions when he went down there to Hill Lines and there was no one there to accept the freight, what would he have done had he followed the strict company instructions and done what he had been instructed to do?

A. He would have come back off of Grant Street to Third and out to the office and left the freight there until after lunch until he could make the delivery of the freight.

R. 19

Roy White testified by oral deposition taken at the instance and request of petitioner. His testimony in part is as follows:

Q. Roy, have you been given any instructions about driving company trucks to lunch?

A. Well there was something said about that. That was against the company rules there to drive the truck; that was always the company rules.

R. 25

Q. This particular incident, isn't it a fact that you had been instructed, positively instructed by Mr. Welch, at no time to drive those company vehicles at any time other than on company business?

A. Yes, sir.

Q. Mr. Welch told you that on no occasion were you to drive a company truck to lunch or other than on company business?

A. That is right.

R. 26

Q. What time did you leave Strickland Transportation Company to go to Hill Lines?

A. It was between 11:00 and 11:30. I imagine it was closer to 11:30. R. 27

Q. What time did you arrive?

A. I made Navajo before I went on to Hill & Hill.

Q. Where was Navajo?

A. It is right here on the 1100 block.

Q. 1100 block on Grant Street, is that correct?

A. Yes, sir.

Q. Did you unload the freight that you had for Navajo?

A. Yes, sir.

Q. When you left the Navajo, where did you go?

A. Hill & Hill.

Q. How far is it from Hill Lines—From Navajo to Hill Lines Inc.?

A. About two blocks.

Q. What time did you say you arrived at Hill Lines?

A. A few minutes after 12:00 because the boys had took off for dinner.

Q. Then after you left—What did you do when you got to Hill Lines?

A. I got out to see if someone would check the freight to unload it but there was no one there.

Q. What did you do then?

A. Well, left and went on out to the house.

Q. Come here on this map and follow for me from the exact time you left Hill Lines until you arrived.

A. I backed out here on 13th and Buchanan.

Q. Which direction did you go from Hill Lines to Buchanan?

A. North from Buchanan.

Q. To Buchanan?

A. East to Buchanan.

Q. Which direction did you go from Hill Lines to Buchanan?

A. I believe it was west.

Q. How many blocks?

A. Four blocks. R. 28

Q. Then which direction did you go?

A. North.

Q. On what street?

A. Buchanan.

Q. How far north did you go?

A. I picked my sister up on 7th and Buchanan.

Q. You went what direction on Buchanan now?

A. I was going north.

Q. Where did you see your sister?

A. On 7th and Buchanan.

Q. Where had you started?

A. I had started out to the house to eat.

Q. Whose house?

A. My sister's.

Q. Where does your mother live?

A. North Grant.

Q. Did you go to your mother's?

A. No, sir.

Q. Why?

A. My sister said no one was out there.

Q. Where did you see your sister?

A. Seventh and Bunchanan.

Q. Did she get in the the truck with you?

A. Yes, sir.

Q. On the corner of 7th and Buchanan Street?

A. Yes, sir.

Q. Then which way?

A. I went north to Third and Buchanan.

Q. Proceeded on Buchanan north to Third Street. Then which way did you go after you got to Third Street?

A. East.

Q. How far on Third Street did you go East?

A. To Grand Avenue.

Q. And after you got to Grand Avenue which way did you go? R. 29

A. I went south to 6th and Grand.

Q. Then which way did you go?

A. East to Dallas.

Q. Is that where your sister lived?

A. Yes, sir.

Q. What did you do when you got there to your sister's?

A. I ate and came on to 10th Street and came on in.

Q. After you left your sister's place which way did you go?

A. South to 10th.

Q. When you got to 10th which way did you go?

A. I turned west.

Q. Where did you go then?

A. I was coming in on 10th to go to Hill & Hill Motor Freight and that is where the accident occurred. R. 30

Q. Now after you picked your sister up on the corner of 7th and Buchanan and proceeded south to Third Street, you say you turned west on third street and went to your sister's home?

A. I turned east.

Q. Turned east and went to your sister's home and in doing that you drove right by the Strickland Transportation place of business?

A. Yes, sir.

Q. You drove right on by. How many blocks east of Strickland Transportation Company's place of business is it to where your sister lives?

A. About 21 or 22 blocks.

Q. And at the time you drove by the Strickland Transportation Company place of business with your sister in the car and proceeded on east, you knew you were doing it in violation of strict company rules and regulations?

A. Yes, sir. R. 30

Q. What is the regular route that you would normally go from Strickland Transportation Company here to Hill Lines, Roy? Show me here on the map, will you?

A. We would come out on Third.

Q. Which way would you go on Third?

A. West.

Q. To what street?

A. Grant.

Q. Which way woud you turn on Grant Street?

A. South to Navajo.

Q. Isn't it true that you were instructed and you knew at the time you went to Hill Lines and you couldn't find anyone to unload this freight that you should have taken the truck back to the Strickland Transportation Company and left it?

A. Yes, sir.

Q. And it is true that you had instructions that you were not to unload freight unless someone was there to give you a receipt for it?

A. Yes, sir.

Q. But it was true that if there wasn't anyone there that you were to return the truck to Strick-

land Transporation until such time as someone was there?

A. Yes, sir.

Q. And had you gone back to the Strickland Transportation Company from Hill Lines at the time which way would you naturally have gone back? R. 31.

A. Gone to Third and Grant and east to Strickland Motor Company. R. 32.

As further evidence of the apparent erroneous application of the present rules of law announced by our Supreme Court of Texas with reference to deviation from the course of his employment by an employee, and more especially to the facts in the case at bar as herein just set out, and whether or not he is in the course of his employment while going to and from meals, petitioner cites as the leading case in Texas the case of *Gulf Refining Company of Texarkana vs. F.T.S. Ry. Company*, reported 261 S.W., page 169. The rules announced in this case might have been the Texas law for a time, but not for long.

The rules of law announced in the Gulf Refining Company case and kindred cases was refuted unquestionably in the case of *Bishop vs. Farm & Home Savings & Loan Association*, reported in 75 S. W. (2), page 285, opinion by the Court of Civil Appeals at Eastland.

In this case, plaintiff brought suit against defendant for damages and personal injuries; at the conclusion of the testimony of the plaintiff, the trial court instructed a verdict for the defendant and plaintiff appealed.

Briefly, the facts were that Willard Weaver was an employee of the defendant in the city of Abilene. On Saturday he left Abilene about 2:30 in the afternoon to spend the week-end with a friend in San Angelo. The visit had no connection whatever with defendant's business. Weaver had an appointment to meet a man on business in Abilene at 8:30 a.m. on Monday; he left San Angelo at 4:30 o'clock that morning with the expectation of returning to his hotel room in Abilene, changing his clothes and filling his appointment. On his way from San Angelo he became involved in an automobile collision, resulting in plaintiff's injuries. Evidence was sufficient to establish that Weaver was an employee of the defendant and that he was negligent in the manner of operating his car, and that plaintiff sustained substantial injuries resulting from the collision.

The court of Civil Appeals, in sustaining the trial court's acts in granting a motion for instructed verdict on the part of defendant, in part said:

> "It is a rule of general acceptation that if a servant steps aside from the master's business for some purpose not connected with his employment, but on a mission of his own, the relationship of master and servant is thereby suspended for the time and the master is not liable for his acts during such period. I. & G. N. Ry. Co. v. Anderson, 82 Tex. 516, 17 S.W. 1039, 27 Am. St. Rep. 902; I. & G. N. Ry. Co. v. Cooper, 88 Tex. 610, 32 S.W. 517; G. H. & S. A.

Ry. Co. v. Currie, 100 Tex. 136, 96 S.W., 1073, 10 L.R.A. (N.S.) 367; Van Cleave v. Walker, (Tex. Civ. App.) 210 S.W. 767; Main Street Garage v. Eganhouse Optical Co. (Tex. Civ. App.) 22 S.W. (2), 714; Reddick v. Prairie O. & G. Co. (Tex. Civ. App.) 51 S.W. (2), 735; Murphy v. Gulf Prod. Co. (Tex. Civ. App.) 299 S.W. 295; Bresnan v. Republic Supply Co. (Tex. Civ. App.) 63 S.W. (2), 1105. *It is urged by Appellant that even though it should be admited that Weaver went to San Angelo in the pursuit of his personal pleasure, the moment he forms the mental conception or determination to end it and re-embark on the business of his employer, he again resumed his duties and re-established the relationship of master and servant. This is the exact contention which was presented to this court in the recent case of Bresnan v. Republic Supply Company, supra. We there gave it careful consideration and declined to adopt it. It is, to our mind, an unsound proposition of law. The whole purpose of the trip was foreign to Appellee's business, and the return was but part of the trip, referable thereto, rather than to the business of the employer.*"

We think unquestionably all doubt as to what the law is in Texas regarding questions involved in the case at bar and about which petitioner is complaining is set to rest by the Commission of Appeals of the State of Texas, the opinion of said court being approved and adopted by the Supreme Court of this state in the case of *Southwestern Dairy Products Company vs. Defratees, et al*, 125 S. W. (2), page 282, the opinion being by Judge Hickman, who

was then a member of the Commission of Appeals, but is now Chief Justice of the Supreme Court of Texas. Briefly, the facts in this case are:

Suit was filed by L. C. Defratees and others against Southwestern Dairy Products Company for damage to taxicab resulting from collision with a truck belonging to Southwestern Dairy. Judgment was rendered in the trial court for the plaintiff.

The dairy company, by proper assignment of error, insisted that the evidence showed conclusively that at the time of the collision Henderson, its employee, was not acting within the scope and course of his employment, and for that reason the court erred in refusing its motion for instructed verdict in its favor after introduction of all the evidence was concluded.

The Court of Civil Appeals for the Second District, at Fort Worth, certified the following questions to the Supreme Court:

> "Should the assignment of error referred to above be sustained?"

The Dairy company maintained two places of business in San Antonio, one designated by witnesses as the main plant, located on Josephine Street, and the other located on Jones Street, where the wash rack was maintained for washing its trucks. The two places were several blocks distance from each other; the main plant was north of the

wash rack. It was the duty of Henderson to drive the trucks from the plant on Josephine Street to the other plant, and after washing them, to drive them back to the main plant ready for use. The hours of his employment lasted from 5:00 o'clock in the afternoon until 1:00 o'clock the night following. The collision occurred about midnight. Shortly before the collision, Henderson had started to drive the truck with which the cab collided from the main plant on Josephine Street to the wash rack on Jones, in order to wash it and then drive it back to the main plant. Instead of going directly to the wash rack, he drove the truck home to get his supper; his home was situated practically due west of the wash rack, and at a distance practically four times the distance between defendant's two places of business. After finishing his supper, he started to the wash rack for the purpose of washing the truck and then driving it back to the main plant where he got it. On the trip back to the wash rack, the collision occurred, at the intersection of Camden and Brooklyn Streets, WHICH WAS ABOUT SIX BLOCKS DISTANCE FROM THE DEFENDANT'S WASH RACK ON JONES STREET AND IN A NORTHEASTERLY DIRECTION THEREFROM, AND NOT ON THE ROUTE BETWEEN THE TWO PLANTS. *The use of defendant's trucks by its employees on missions of their own had been strictly forbidden, all of which was well known to Henderson, who testified that he drove the truck to his home to get his supper,*

well knowing that such was forbidden by his employer. Judge Hickman, in passing upon the certificate in part said:

> "The facts recited in the certificate show a complete departure by Henderson from the course of his employment; that is, from the service of his master. The relationship between an owner of an automobile and one employed by him to drive it is the same as that between master and servant generally. The liability of the owner for the negligence of the driver is to be determined by an aplication of the general rules of law governing the liability of master for the negligence of his servant. It is the firmly settled rule that when a servant completely departs from his work to accomplish some purpose of his own not connected with his employement, the relation of master and servant is thereby temporarily suspended, and the master is not liable for his acts during the period of such suspension. International & G. N. R. Co. v. Cooper, 88 Tex. 607, 32 S.W. 517; Branch v. I. & G. N. R. Co. 92 Tex. 288, 47 S.W. 974, 71 Am. St. Rep. 844; Galveston, *H.* & S. A. Ry. Co. v. Currie, 100 Tex. 136, 96 S.W. 1073, 10 L.R.A., N.S., 367; Hill v. Staats, Tex. Civ. App., 187 S.W. 1039, on rehearing Tex. Civ. App., 189 S.W. 85, error ref.; Bresnan v. Republic Supply Co., Tex. Civ. App., 63 S. W. 2d 1105 error ref.
>
> "Many cases which are relied upon as departures from or exceptions to the above rule may be grouped in two classes; first, those in which the departure was not wholly disconnected from the employment, but in which there was a mingling of the personal purposes of the servant with the doing of the mas-

ter's work; and second, those in which the departure was but a deviation and not a complete turning aside. THIS CASE DOES NOT FALL WITHIN EITHER OF THESE TWO CLASSES, BUT IS ONE OF COMPLETE DEPARTURE FOR A PURPOSE NOT CONNECTED WITH THE EMPLOYER'S BUSINESS AND NOT WITH THE EMPLOYER'S CONSENT. That being the nature of the case, then by practically all of the authorities, and certainly by the well established rule in this State as reflected by the cases cited, had this accident occurred while Henderson was on his way home to get his supper, Appellant would not have been liable for the injuries sustained.

"Is the master's liability to be governed by a different rule when, as in this case, the accident occurs on the return trip? There is respectable authority for the proposition that when a servant has completed the purpose for which he departed from his master's business and is returning to resume the duties of his employment, he is, while so returning, engaged in his master's business, and the master is therefore liable for injuries caused by his negligence on the return trip. Much has been written in support of this theory, and perhaps an equal volume against it. We shall add but little to what has been written upon the subject. WE FIND OURSELVES UNABLE TO ADOPT THE REASONING OF THE COURTS WHICH APPLY THIS THEORY. Of course, the purpose in the mind of Henderson while on the return trip was to take up the duties of his employment, but, the master's liability does not rest alone upon the the purpose in the mind of the servant. The test of liability is whether he was engaged in his

master's business, and not whether he purposed to resume it. It is equally true that Henderson owed the duty to his master of returning the car and resuming his employment, and while returning to the zone of his employment, he was discharging that duty, BUT THAT FACT DOES NOT FIX LIABILITY AGAINST THE MASTER. IT WAS HENDERSON'S OWN WRONG, IN DRIVING AWAY THAT CREATED THE DUTY TO RETURN, AND IN RETURNING HE WAS BUT UNDOING THAT WRONG. The return was referable to, and an incident of the departure. He was no more engaged in his master's business while returning to than while departing from his path of duty. Fletcher v. Meredith, 148 Md. 580, 129 A. 795, 45 A.L.R. 474; Model Laundry v. Collins, 241 Ky. 191, 43 S.W. 2d 693; Cannon v. Goodyear Tire & Rubber Co., 60 Utah 346, 208 P. 519; Bringman v. Zuckerman, 192 Mich. 624, 159 N.W. 316; Anderson v. Nagel, 214 Mo. App. 134, 259 S.W. 858; Colwell v. Aetna Bottle & Stopper Co., 33 R. I. 531, 82 A. 388.

"The question certified is answered in the affirmative."

The rules of law announced in the Bishop and Defratees cases, supra, are re-stated by our Supreme Court in the Huerta case, supra, when the court said:

"We believe the better rule to be that the relation of the master and servants temporarily suspended by the servant's departure from his work to accomplish a purpose of his own, and not connected with his employment, and is re-established when he has

returned to the place where the deviation occurred or to a place where in the performance of his duties he is required to be."

In the case of *Gammill v. Mullins*, 188 S. W. (2), 986, the Court pronounced the following rule of law:

"A servant completely departing from his work and engaged in a mission of his own, is no more engaged in his master's business in returning to than while departing from his path of duty."

Again, in the case of *Valencia vs. Western Union Telegraph Company*, a case by the Supreme Court of Texas, reported 172 S. W. (2), page 86, the Court in its opinion in part said, following the Defratees case:

"In the Defratees case, this court speaking through the Commission, pointed out that the employee was no more engaged in his master's business while returning to than while departing from his path of duty; that it was the employee's wrong in departing from his duty that created the duty to return, and that in returning he was but undoing the wrong."

In the 1941 Texas Jurisprudence Supplement, page 422, we find the following:

"The defendant may not be held liable as a general rule where the evidence shows that the driver was using the vehicle in violation of the defendant's instructions and without express or implied authorization, nor is any distinction to be drawn on the ground that the collision occurred while the driver was returning to the place where he was to resume

the performance of the service of his employer. Where driver deviates from his employment, the question to be resolved in such circumstances is, to-wit, the driver's deviation was of such a character to permit of a conclusion that it might have been foreseen by his employer and would not be consented to by him."

Blashfield's Cyclopedia of Automobile Law and Practice, Volume 5, page 199, Section 3042, we find the following:

"Although the eating of food may be necessary to keep up an employee's vitality so as to enable him to perform the duties of his employment, ordinarily servant cannot be said to be in his master's business or acting within the scope of his employment while eating or on his way to eat."

"Accordingly, the relationship of master and servant must ordinarily be deemed suspended while he is going to and from his meals, particularly where the servant is to board himself and the master is not liable for his servant's negligence while so traveling to and from meals, although the servant is driving the master's machine. This is especially applicable where servant's use of the master's car is against orders of the master."

In Blashfield's Cyclopedia of Automobile Law and Practice, Volume 5, page 212, Section 3151, we find:

"MAJORITY RULE, AND PROBABLY THE BETTER VIEW, IS THAT THE RELATION OF MASTER AND SERVANT IS NOT RESTORED UNTIL THE SERVANT HAS RETURNED TO

THE PLACE WHERE THE DEVIATION OCCURRED OR TO A CORRESPONDING PLACE, SOME PLACE WHERE IN THE PERFORMANCE OF HIS DUTIES HE SHOULD BE."

In the case of *Curry v. Geckly*, 195 Mo. 617, 198 Ia. 827, the court, in announcing its opinion, in part said:

> "There are courts that have recognized a rule that if an employee takes his employer's car for his personal purposes, while he is in the act of returning directly to the scene of the employment to resume his work, he is in the the employer's service. We refuse to follow the authorities so holding or to acquiesce in such a rule. The very decided weight of authority is to the contrary. It has been frequently held that where the employee, without the consent of his employer, leaves the scene of his employment and takes the employer's automobile for purposes solely his own, whether of business or pleasure, by so doing he steps entirely outside the scope of his employment, and that the employer is not liable for his negligent acts while so engaged, whether he be going from or returning to the place of his employment. He is no more engaged in the employer's business under such circumstances in getting back to the place of employment than he was in going away from it. He is serving his own purpose during all of such time. He lays aside his character of employee, and without any right or authority so to do, takes his employer's car for purposes wholly personal to himself. He does not resume in any legal or proper sense the service of his master merely when he returns to get back to his place of employment."

We think another case squarely in point with the case at bar is *Pesot vs. Yanda, et al,* reported 126 S. W. (2), page 240. The opinion is by the Supreme Court of Missouri, Division No. 2. Suit was by Pesot against Yanda and the Metropolitan Life Insurance Company for damages for personal injuries. Judgment was for the plaintiff against the named defendants; Metropolitan Life Insurance Company appealed, and the case was reversed.

Yanda was employed by Metropolitan Life Insurance Company as a collector. He was required to report to the office each morning to deposit or turn over to the cashier the collections he made the preceding day. He would then proceed on his day's work as directed by his employer. His regular route in going from his home to the office, and the one he would have followed on that occasion, but for the digression presently to be noticed, was to go north from his home to Park Avenue and then west on Park Avenue to the office. On the morning in question, instead of going by regular route to the office, Yanda took his wife to the Kroger Baking Company at 39th and Rutger Streets, where she was employed. That point is several blocks west and north of Grand and Park, where the accident happened. Leaving her, he then started east on Park Avenue toward the Company's office, to report and turn in the preceding days collections, which he had with him, and was thus on his way to the office when the collision occurred. The Court, in its opinion in part said:

"We deem it unnecessary to decide whether or not the relationship of master and servant, such as to invoke the doctrine of respondeat superior, existed as between Appellant and Yanda while the latter was performing the duties of his employment, BECAUSE, IN OUR OPINION, EVEN IF IT WERE CONCEDED THAT SUCH RELATIONSHIP EXISTED, YANDA WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT AT THE TIME AND PLACE OF THE ACCIDENT IN QUESTION. The situation must be viewed and the question of liability ruled with reference to that time and place. A master is liable for the acts of his employee only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the result of the wrong at the time of the injury, and in respect to the very transactions out of which the injuries arose. In going from his home to Kroger Baking Company to take his wife to her working place, Yanda was clearly on a mission of his own. Respondent says that when Yanda left his wife at the Kroger Baking Company and started from there to the office, he then and there returned to his employment, reassumed—if he had temporarily abondoned—the relationship of servant, and that from the moment he started back to the office, the relationship of master and servant between appellant and himself existed; therefore it existed at the time and place of the accident. We do not think so. It is argued that if he had not been going to the office to report he would not have been at Grand and Park Avenue, the place where the accident occurred, and hence could not have been involved in it, but neither would

he have been there at the time if he had gone from his home to the office in the discharge of his duties as an employee, by his usual and direct route, as by his own testimony he would have done had he not chose to perform a mission of his own before beginning the day's work for his employer."

Reiterating, we think the Circuit Court of Appeals properly decided this case, and that the trouble petitioner and her counsel are having is applying the rules of law as they now exist in Texas and in most every other jurisdiction to the facts in the case at bar.

The trial court sustained Respondent's motion for an instructed verdict upon two grounds; first, that petitioner had failed to establish by competent evidence that Roy White on the occasion in question was acting in the course and scope of his employment for Respondent; and second, that he was driving the truck in question without the knowledge and consent of respondent.

The trial court, by its action in sustaining the motion for an instructed verdict, found as a matter of fact that White had deviated from the course of his employment; that he had not returned to the point where the deviation occurred or to a corresponding place, some place where in the performance of his duties he should be. The Circuit Court of Appeals approved the action of the trial court in its action.

It was encumbent upon petitioner to plead and prove that White was acting in the scope and course of his employment on the occasion in question before she would be entitled to recover from respondent. This is a rule of law so universally adhered to that really citing authorities should not be necessary. In connection with this, however, we call the court's attention to the following cases:

McCoy v. Beech-Whitham Company, et al, 22 S. W. (2), 714;

Missouri-Kansas-Texas RR Company v. Salsman, 58 S. W. (2), 1026;

Marsh vs. American National Insurance Company, 16 S. W. (2), 333.

These cases held substantially as follows:

> "Where recovery is sought of master for injuries inflicted by servant, plaintiff must show that servant did wrong while acting within the scope of his employment."

The testimony of Welch and White is all of the evidence offered upon the trial of this case touching the question of whether or not White was acting in the scope and course of his employment on the occasion of the incident in question, and not only fails to establish that White was acting in the scope of his employment, but to the contrary, unequivocally, positively, and definitely proves

that White was not acting in the course and scope of his employment at the time of the incident in question.

The recorded testimony of Welch and White heretofore quoted stands uncontradicted and establishes the fact that White was instructed by Welch not to drive the truck in question other than on Company business, or home to lunch, that if he called at a client's place of business for the purpose of delivering freight and there was no one to accept same and sign a receipt therefor, he was to return the truck and freight to the place of business of respondent; that on the occasion in question, upon leaving Hill Lines, after being unable to locate someone there to receipt for the freight, White proceeded four blocks west to Buchanan Street, then 10 blocks north to Third Street, then 29 blocks east on Third Street, where he turned 3 blocks south on Grand Avenue to Dallas Street, and one block east on Dallas Street to his sister's residence for the purpose of having lunch. After having said lunch, he returned one block west on Dallas Street to Grand Avenue, four blocks south on Grand Avenue to Tenth Street, and proceeded West on Tenth Street to where same intersects with the Fort Worth and Dallas highway, where the accident occurred, which point is approximately one mile west and three blocks north of the Hill & Hill Motor Freight Lines; that the ordinary, usual route that White would have travelled in proceeding from 1507 East Third Street, Respondent's place of business, to Hill Motor Freight Lines

for the purpose of delivering freight would be to go west from respondent's place of business on Third Street to Grant, a distance of four blocks, then turn south on Grant Street and proceed a distance of ten blocks to Hill & Hill Motor Freight Lines.

The query then arises, "At the time the accident occured, had White returned to the place where the deviation occurred, or to a place where in the performance of his duties for his master he should have been." The uncontradicted testimony in this record does not warrant an affirmative answer to this inquiry. White's deviation started as he proceeded east on Third Street, when he passed his master's place of business at 1507 East Third Street, where, under positive instructions, he should have left the truck and freight, and proceeded to his lunch. Upon returning from lunch, he should have procured the truck and freight and then gone four blocks west on Third Street and proceeded 10 blocks south on Grant Street to Hill Motor Freight Lines, this being the regular, ordinary, usual and direct route used to proceed from respondent's place of business to Hill Motor Freight Lines. White did not do this; he proceeded on from the place of deviation, to-wit, respondent's place of business, 21 blocks east on Third Street to Grand Avenue, 3 blocks south on Grand Avenue to Dallas Street, and 1 block east on Dallas, to his sister's residence where he had lunch. After finishing his lunch, he proceeded west one block on Dallas

Street to Grand Avenue, south on Grand Avenue 4 blocks to Tenth Street, and west on Tenth Street to where the Fort Worth highway intersects said street, where the accident occurred, which was substantially a mile from where Hill Motor Freight Lines is located. Certainly at no time from the instant White passed his employer's place of business on Third Street proceeding east until the time of this accident was he at the place where the deviation occurred or at a place where in the performance of his duties for his master he should have been. To the contrary, he was one mile east of Hill Lines, and 12 blocks east and 7 blocks south of his employer's place of business. For him to have been in the place where the deviation occurred he would have had to be at respondent's place of business located at 1507 East Third Street, this being the place where the deviation began. For him to have been at a place where in the performance of his duties for his employer he should have been, he would have had to be on Third Street somewhere between his employer's place of business at 1507 East Third Street, and Grant Street, a distance of four blocks, or somewhere on Grant Street between the point where same intersects with East Third, and Hill Motor Freight Lines, a distance of ten blocks. As this record reflects, the place where the accident occurred is substantially a mile south and east of any of the places where White should have been for it to be said that he was in the scope and course of his employment on the occasion in question.

Judge Hickman held that Henderson was not in the scope and course of his employment, yet the record in that case reflects that Henderson was only 6 blocks from the wash rack where he should have been washing the car at the time of the accident, and was only about 4 blocks from the route he should have been traveling in the conduct and carrying on of his master's business.

In its supporting brief, counsel for petitioner cites the case of *Maryland Casualty Company vs. Levines*, reported 67 Fed. (2), 816, and contends it supports their theory in the case at bar. The record in the Levines case clearly reflects that the employee at the time he was killed had returned from his deviation and was on the direct route from his employer's place of business to the place he had been sent by said employer, and the Circuit Court of Appeals for the 5th Circuit in so holding in its opinion in part said:

> "The jury found upon ample supporting evidence that Levine was killed on the direct route to the place where he had been sent on Company business."

While this case was being argued by counsel for petitioner before the Circuit Court of Appeals, this fact was called to the attention of petitioner's counsel by the presiding judges and the distinction between the facts in the Levine case and the case at bar was made.

The Defratees case, supra, clearly overrules the holding in the Gulf Refining Company of Texarkana case,

supra, and all cases in Texas announcing similar rules prior to the Defratees case, and in so doing, as set forth in the cases and text books previously referred to in this brief, which in our opinion in substantially all respects save and except the Gulf Refining Company case, supra, and other cases holding in accord therewith, up to the time of the Defratees case, are in accordance with the holding of the cases and textbooks referred to in the supporting brief of petitioner. This is pointedly brought out wherein they cite the *Southwestern Bell Telephone and Telegraph Company vs. Quick*, 149 Southern, 109. This case in part, in its opinion, said:

> "In cases where the deviation is slight and not usual, the court may and often will as a matter of law determine that the servant was still executing his master's business, *so too, where the deviation is very marked and unusual the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact to be left to the jury or other trier of such questions.*"

We think each case cited by petitioner in her supporting brief is clearly distinguishable and can be easily reconciled with the law as applied to the facts in the case at bar; this is forcefully portrayed where petitioner on page 47 of her supporting brief recites from 5 Texas Jurisprudence page 778 the following:

> "If within the course of his employment an employee is permitted to use his employer's vehicle to facilitate the performance of necessary errands of his own, he does not, while on this errand cease to be an employee, but is still an employee and the legal principal of respondeat superior applies."

This rule is not applicable in the case at bar. Positive and uncontradicted testimony reflects that White was not permitted to use the truck in question for the purpose of going to lunch and in the course of his employment was not permitted on any occasion to use the truck in question to facilitate the performance of a necessary errand of his own.

The above is further portrayed by the fact that in the supporting brief, counsel for petitioner cites the case of *Standard Coffee Company vs. Trippett*, 108 Fed. (2), 161, and quotes from such opinion. In this case, the court, in passing upon the question, in part said:

> "In the case at bar, McAdams was the only person who knew the true purpose of the trip to Lufkin. He testified that he was going back after a razor; the day was Thursday and he would return to his home on Saturday. One may conclude that he would not stand in need of the razor to any great extent until he returned home. Moreover, this statement about driving over 40 miles for a razor was certainly discredited by the introduction of his prior written statement that he was going back to pick up some special blend of coffee."

The court took the position that this testimony was not so clearly positive and unequivocal as to warrant as a matter of law the overturning of the presumption arising from the ownership and operation of the automobile.

We have no such doubts, or equivocations, under the testimony in the case at bar. White's uncontradicted testimony is that he used the truck in question for the purpose of going home to lunch and that he had been positively instructed not to so use said truck at any time. He was corroborated in the statement that he had been instructed not to use the truck for the purpose of going home to lunch by Welch, manager for his employer, who hired him. Certainly this is clear, positive, and unequivocal testimony, that is in no way clouded or questioned. Could it be said that the trier of the facts would be in a position to say that they just did not believe White and Welch and would therefore conclude that White was in the course of his employment? Since White and Welch were the only parties testifying regarding whether or not he was in the course of his employment, what testimony would warrant the trier of the facts to conclude that White was acting in the scope and course of his employment? Judge Hutchinson, who sat as one of the judges in the Standard Coffee Company case and signed the decision and opinion, we think very clearly observes what the majority of the court had in mind that would distinguish it from the case at bar when he said:

"The error of the majority springs, I think, from its treating as evidence and giving evidential effect to plaintiff's prior contradictory statement, introduced and admitted for impeachment purposes alone."

In Texas, proof of ownership and driving of a vehicle raises the presumption that the driver was acting in the course of the employment of the owner on the occasion in question. This presumption, however, is put to flight by the introduction of positive and unequivocal testimony by the owner as to the acts of the driver on the occasion in question. We think an excellent statement of the Texas rule on this point is found in the case of *Houston News Company vs. Shavers*, 64 S. W. (2), 384, wherein the court in its opinion in part says:

"Evidence that the truck with which the injury was committed belonged to the News Company, that it was being driven by one regularly in its employ, in the absence of evidence to the contrary raises a presumption that such servant was engaged in the news company's business at the time of such collision. This, however, is a mere rule of procedure, and the presumption vanishes when positive evidence to the contrary is introduced. The presumpiton grows out of the fact that not infrequently the evidence necessary to establish the character of the mission on which the servant was engaged is exclusively within the possession of the Defendant. The effect of the rule is to smoke out the defendant and compel him to disclose the true facts with his knowledge. When, however, he discloses the true facts within his possession, and such evidence is positive to the

effect that the servant was not engaged in the master's business at the time of the injury, the presumption is nullified and the burden is then upon the plaintiff to produce other evidence or his cause fails."

Other cases supporting this rule of law are:

Alfano vs. International Harvester Company, 121 S. W. (2), 466;

Hudson vs. Ernest Motor Company, 115 S. W. (2), 1167;

Texas News Company vs. Lake, 58 S. W. (2), 1044.

Petitioners, through her attorneys, further takes the position, we think erroneously, that since the evidence showed White was regularly in the employ of respondent and driving a truck belonging to them at the time of the accident, this testimony raised the presumption that White was acting in the course of his employment and that therefore the jury did not have to believe and rely upon the rebuttal testimony offered by respondent, apparently taking the position that such testimony was not clear, positive, and unequivocal, and since they contend it came from interested witnesses, and cite the *Standard Coffee Company vs. Trippett*, and the *Broaddus vs. Long* cases.

Their position in this matter, we think, is untenable, first because the testimony offered by respondent to rebut and overcome the presumption that White was acting in the course of his employment on the occasion in

question 'we think' was wholly uncontradicted, clear, positive, and unequivocal; that there were no circumstances in evidence tending to discredit or impeach such testimony; therefore, full effect should be given thereto.

We have no quarrel with the position taken by attorneys for petitioner that the rule of law in Texas that the credibility of an interested witness and the weight to be given his testimony are questions for the determination of the court or jury trying the case. There are exceptions to this rule, however.

In the case of *Bowers vs. Bingham*, 159 S. W. (2), 756, the Court in its opinion in this case in part said:

> "The general rule as established by our Supreme Court is that credibility of an interested witness and the weight to be given his testimony are questions for the determination of the court or jury trying the case, notwithstanding such testimony may be uncontroverted and such witness unimpeached.
>
> "*This rule, however, has its exceptions; when the testimony of such an interested witness is wholly uncontradicted, is clear, positive, and unequivocal on the point at issue, and there are no circumstances in evidence tending to discredit or impeach such testimony, conclusive effect should be given thereto.*"

Great Southern Life Insurance Company vs. Dorough, Texas Civil Appeals, 100 S. W. (2) 772;

Texas Employers' Insurance Association vs. Roberts, 139 S. W. (2), page 8.

In the case of *Moody vs. Kimball*, 173 S. W. (2), 270, the Court, in its opinion in part said:

> "We realize that there is a general rule that the testimony of an interested party to a suit, though it is not contradicted by any other witness, does no more than raise an issue for the determination of the jury, *but there is an apparent exception to this rule where the testimony of an interested witness is not contradicted by any other witness or attendant circumstances, and same is clear, true and positive, and free from contradictions, inconsistencies, and circumstances tending to cast suspicion upon it, in such case it is held that an instructed verdict may be given on such testimony.*"

This same rule of law is announced in *Lankford vs. El Paso Packing Company*, 1 S. W. (2), 476, and many other cases cited from the cases hereinabove quoted from.

Without again quoting the testimony of White and Welch on the point involved, since same has been heretofore set out and referred to, we think such testimony clearly falls within the exception of the rule above set forth.

Second, we think the rule attorneys for petitioner are trying to apply here is not applicable, for the reason that if the testimony of the interested party is corrobarted, then the rule is not applicable.

At the time they gave their testimony, White by deposition prior to the date of the trial, and Welch at the time

of the trial, neither of said individuals were in the employ of respondent, both having long since left such employ; therefore, under the rules, which we will hereafter discuss, we think neither of these individuals were interested parties. Certainly Welch was never an interested party by reason of the fact that he was not in the employ of respondent at the time of giving his testimony, and was not a party to the suit.

In the case of *Koenig vs. Marti, et al*, reported 103 S. W. (2), page 1023, the court in its opinion in part said:

> "In the group of assignments which we have discussed in this class there is one which complains that the testimony of appellee, she being an interested witness, could not be taken as conclusive proof; that the appellant was entitled to have the jury pass upon its weight and her credibility. The assignment announces a correct principal of law in some cases, but when the testimony of an interested witness, as in this case, is corroborated by other testimony, such as by an adverse party, and the uncontroverted written assignments, the rule is not applicable."

In the case of *Robelin vs. Brooke*, 201 S. W. (2), page 98, the court in part said:

> "A jury cannot entirely disregard the uncontradicted testimony of an interested witness when it is strongly corroborated by cogent facts and circumstances in evidence."

In the case of *Pyland vs. Sayers*, 148 S. W. (2), 450, the court announced the following rule:

"While interested witness's testimony is not conclusive of fact issue involved and may be disbelieved, uncontradicted, clear, positive, and unequivocal testimony cannot be disregarded, and judgment contrary thereto rendered in the absence of evidence tending to impeach or discredit such testimony, especially where there is evidence to corroborate it."

We think White's testimony was corroborated by the facts and circumstances and also by Welch, and that therefore the rule contended by attorneys for petitioner above referred to is not applicable.

Third: As has heretofore been reflected, White testified by deposition; at the time he gave this testimony he was no longer in the employ of respondent. Welch testified upon the trial of the case; at the time of his testimony he was no longer in the employ of respondent. It has been held in this state, under these circumstances, that neither White nor Welch would be considered interested parties or witnesses. In the case of *Alfano vs. International Harvester Company of America*, 121 S. W. (2), 466, the court in part said:

"That the entire nature of the defensive testimony may have proceeded from interested witnesses does not vary the rule if in fact there be a full disclosure (citing cases), there being nothing to cast any suspicion upon the verity of defense witnesses. However, Mr. Barney was clearly not an interested witness, insofar as concerned appellee. Upon the trial, he took the stand in his own behalf (he having been

> sued along with his employer), and was not then an employee or maintaining any character of relationship with the Company. On the other hand, at that time it was in the interest of Mr. Barney to establish a basis of employment with appellee in order that a possible adverse verdict might be shared."

In the case of *Pyle vs. Phillips*, 164 S. W. (2), page 569, the court announces the following rule:

> "Where witness was no longer an employee of defendant at the time of the trial he was a disinterested witness, and hence his testimony could not be completely disregarded."

Apparently the rules of law announced in these two cases clearly overturn any question that White or Welch either were interested parties or witnesses to the extent that their credibility should have been submitted to the jury.

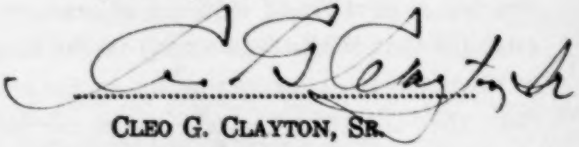
We respectfully submit that the evidence in this case, and the apparently uncontradicted Texas law applicable thereto, reveals that White had deviated from the course of his employment; that he had not returned to the place of deviation or to a place where in the performance of his duties for his employer he should be; that he was driving and operating the truck belonging to respondent on the occasion in question in positive violation of instructions given him by respondent; that the presumption raised upon the trial of the case that White was acting in the scope and course of his employment on the oc-

casion in question was clearly overcome by clear, unequivocal, unrebutted, positive testimony of disinterested parties to said cause of action; that this being true, there was not a scintilla of evidence offered by petitioner to establish that White was acting in the scope and course of his employment for respondent on the occasion in question; that therefore the trial court correctly instructed the verdict for respondent and the Circuit Court of Appeals correctly affirmed its action in doing so.

We think a reading of the cases in this brief and a comparison of same with the applicable cases in petitioner's supporting brief conclusively establishes that the Fifth Circuit Court of Appeals has in no way refused to follow the decisions of the State of Texas on the points of law involved in this case. To the contrary, we submit that they are in all respects harmonious, and since Texas law is applicable and governs the court's action in this case, we respectfully submit that petitioner's ap-

plication for Writ of Certiorari should be in all things denied.

Respectfully submitted,



CLEO G. CLAYTON, SR.
Barfield Building
Amarillo, Texas

JOHN R. FULLINGIM
Barfield Building
Amarillo, Texas
Attorneys for Respondent

A true copy of this brief has been furnished attorneys for petitioner:

DORSEY HARDEMAN
McBurnett Building
San Angelo, Texas

JOHN J. WATTS
P. O. Box 1031
Odessa, Texas